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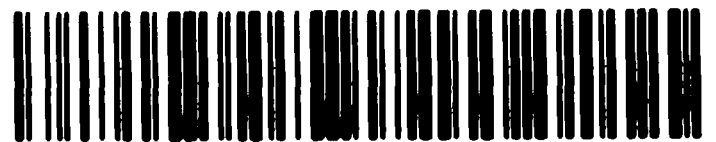
A
TREATISE

ON THE
SYSTEM OF JUSTICE ADMINISTERED
IN
COURTS OF CHANCERY.

BY
GEO. TUCKER BISPAM.

PHILADELPHIA:
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P R E F A C E .

DURING the past few years the growth of equity jurisprudence, both in a scientific and a practical aspect, has been very great.

The decisions of the courts, especially in England, have been marked by a freshness and a vigor which have infused new life into the whole body of chancery law, and have rendered it not only attractive to the student, but of immense usefulness in its application to the business affairs of men.

This practical usefulness has been extended by statute, as well as by judicial decision; and legislation upon this subject has, in England, culminated in the passage of the Supreme Court Judicature Act of 1873, by which it is provided that the principles of equity shall hereafter be adopted, for the purposes of the administration of justice, in all the courts.

To a certain extent the literature of this branch of the law has kept pace with the growth of the law itself. Treatises are constantly being produced in which particular subjects connected with the jurisprudence of courts of chancery are ably and elaborately discussed; and works upon Trusts, Injunctions, Fraud, Estoppels,

and kindred topics, have multiplied in the libraries of the profession. Moreover, in England, efforts have been made to generalize the progress which the science of equity has been making; and several treatises, of a more or less comprehensive character, have been written in which the advances of the law in this great field of justice have been pointed out.

In the United States, however, scarcely any attempt has been made recently in this direction. The efforts of those members of the profession who have the time and inclination to devote themselves to legal literature, have been directed towards the production of treatises upon particular subjects, or to the annotation of existing standard commentaries. Hence, there seems to have arisen a want for some general work in which the development and present condition of equity jurisprudence should be expressed.

The present treatise is an attempt to supply this want. The effort has been to explain the modern doctrines of courts of equity, and to illustrate the manner in which they have been applied; and at the same time to exemplify and define the principles of equity as they have existed in the English law from the earliest times.

It will be seen upon examination that the general plan of the treatise is based upon the division suggested by Mr. Spence in his celebrated work upon the Jurisdiction of the Court of Chancery, viz., Equitable Titles, Equitable Rights, and Equitable Remedies; but that the arrangement of the subdivisions under these general heads is to a great extent original.

As the present book is designed for students as well as for practitioners, one great object has been to avoid a superabundance of citations upon the one hand, and upon the other any omission of authorities by which the doctrines stated in the text ought to be verified and illustrated.

It cannot be hoped that the proper mean between these two extremes has been always observed; but it is trusted that the authorities cited have been sufficiently numerous to give to the practitioner in every State the benefit of decisions of his own courts upon the subjects attempted to be explained, while, at the same time, care has been taken not to overcrowd the treatise with masses of authorities upon single points.

In citing particular decisions at any length, selections have generally been made from the modern reports, partly because such volumes are usually within the convenient reach of almost every reader, and partly because in them (and particularly those which contain the decisions of the English equity judges of the present time) the doctrines sought to be explained have been most elaborately discussed, and their application most practically illustrated. For the same and other obvious reasons, the treatises upon particular subjects which have been referred to have almost invariably been those of writers of the present day.

It need hardly be said, however, that while, for the purpose of presenting a view of equity jurisprudence as it now exists, modern treatises have been consulted and modern authorities cited, yet at the same

time regard has been always had to the ancient decisions wherein the principles of equity have had their birth and their early development. Every writer, as well as every student, should always have in his recollection the advice of Sir Edward Coke, "that in reading any of these new reports he neglect not the reading of the old books of years reported in former ages, for assuredly out of the old fields must spring and grow the new corn."

G. T. B.

PHILADELPHIA, February, 1874.

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ERRATA ET ADDENDA.

Page 2, note 1, *for* "Mayne," *read* "Maine."

" 21, line 24 of note, second column, *for* "The proposed revision of the Constitution," *read* "The Constitution adopted in December, 1873."

" 37, line 4, *for* "vendor," *read* "vendee."

" 119, note 2, add "Downington *v.* Mitchell, 1 Green (Ch.) 258; Cooney *v.* Woodburn, 33 Maryl. 320."

" 163, line 21, *for* "other kinds of personalty," *read* "personalty in possession."

" 177, note 4, add "McNeil *v.* The Tenth National Bank, 46 N. Y. 325."

" 268, note 1, *for* "Wallayn *v.* Lee," *read* "Wallwyn *v.* Lee."

" 269, note 1, same correction.

" 398, line 22, *for* "far," *read* "fair."

" 400, line 7, *for* "Grant *v.* Fynney," *read* "Gaunt *v.* Fynney."

" 427, in note 1, add "Tucker *v.* Kenniston, 47 N. Hamp. 267; Clouston *v.* Shearer, 98 Mass. 209; Williams *v.* Fitzhugh, 37 N. York, 444."

" 504, in note 4, add "Tucker *v.* Kenniston, 47 N. Hamp. 267."

THE
PRINCIPLES OF EQUITY.

INTRODUCTION.

CHAPTER I.

RISE AND PROGRESS OF THE HIGH COURT OF CHANCERY.

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| 1. Definition of equity. | 9. General conclusions deduced from the above—writ of subpœna. |
| 2. Importance of the historical view of equity. | 10. Progress of the jurisdiction of the chancellor. |
| 3. Early English courts; the councils of the king. | 11. Changes in the English system introduced by Act of August 5, 1878. |
| 4. Ordinary council, or <i>curia regis</i> ; Exchequer and Common Pleas. | 12. Principles of equity adopted in the United States. |
| 5. Court of King's Bench. | 13. Jurisdiction of the federal courts. |
| 6. Position of the chancellor. | 14. Changes in mode of procedure in some of the States. |
| 7. Origin of his extraordinary jurisdiction. | 15. Classification of the States upon this subject. |
| 8. Cases in which this jurisdiction was exercised. | |

1. EQUITY is that system of justice which was administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction.

This definition is rather suggestive than precise; and invites inquiry rather than answers it. But this must necessarily be so. Equity, in its technical and scientific legal sense, means neither natural justice nor even all that portion of natural justice which is susceptible of being judicially enforced. It has, when employed in the language of English law, a precise, definite, and limited signification, and is used to denote a system of justice which was administered in a particular court—the nature

and extent of which system cannot be defined in a single sentence, but can be understood and explained only by studying the history of that court, and the principles upon which it acts. In order to begin to understand what equity is, it is necessary to understand what the English High Court of Chancery was, and how it came to exercise what is known as its extraordinary jurisdiction. Every true definition of equity must, therefore, be, to a greater or less extent, a history.¹ This history has become, so to speak, rounded and complete by the passage of the "Supreme Court Judicature Act of 1873," whereby the judicial system of England has been recast, and the distinction between courts of equity and courts of law abolished.² By that act it is, in substance, provided, that, after the second day of November, 1874 (the date on which the act is to come into operation), the administration of justice in all courts is to be regulated by the principles of equity; and the passage of the act may be considered as the final triumph of those principles, after a struggle of many centuries' duration, and as a full recognition of their usefulness and wisdom.

2. Nor is this historical character of the definition of equity any the less to be regarded in the United States than in England.

In some States of the Union the principles of equity are administered through the medium of common law or statutory forms; in some the common law judges act also as chancellors, and in a third class courts of chancery (by that name) exist. All of these look for their guidance to the principles which were developed in the English Court of Chancery, and the first inquiry of the student in this branch of law must always be directed to the origin and growth of that tribunal, and the character of the relief which it administered.

3. To appreciate the nature of this equitable relief, and the reason why redress of this peculiar sort came to be afforded by

¹ So, also, the *Æquitas* of the Roman law can only be defined by tracing the history of that law. It is almost as incapable of definition in a single sentence as the English "equity," with which, by the by, it should not be confounded. See Mayne's Ancient Law, chap. iii. The same author describes or defines English equity as "the jurisprudence of the Court of Chancery." *Id.* 44.

² 36 and 37 Vic. c. 66; L. R. 8 Stats. 306.

the chancellor, we must look, for a moment, at the general system of English remedial law as it existed in early times.

According to the plan which was established after the Norman Conquest, the local tribunals which had existed under Edward the Confessor, and which consisted of the county, hundred, and borough courts, together with the manor courts and courts baron, were retained; but the supreme judicial (and, indeed, all other) authority was vested in the king, assisted by his councils.

These councils were two in number—the great council, afterwards called the parliament, and the small or ordinary council, which advised the king during the intervals between the sessions of the great council, but which appears to have formed part of the latter when in session.¹

The great council was composed of the bishops, earls, and barons, and such knights as held of the king *in capite*. Its duties were perhaps as much judicial as legislative, and in both branches its action was advisory rather than potential.² The king, in fact perhaps, and certainly in theory, enacted laws and redressed particular grievances (of which complaints were made by petition) with the advice and assistance of the magnates of the realm; and although modern English legislation has departed widely from the ancient in substance, its theory is in this respect still the same, and statutes are still supposed to owe their existence to the will of the sovereign after taking the counsel of Parliament.

It is unnecessary to trace the growth and powers of the great council. To it indifferently with the smaller council was formerly applied the name of *curia regis*—a term which was subsequently used to designate the latter council only, and the meaning of which was afterwards still further narrowed so as to apply to the Court of King's Bench alone.

4. The ordinary council of the king was composed of such barons of the realm as were selected by him; certain officers of the palace, such as the constable, marshal, chamberlain, and others, and to these were afterwards added persons learned in the

¹ See 1 Spence Eq. 328 and notes.

the *advice* even of the Lords rather than

² "Generally speaking, indeed, as regards all matters besides taxation, it was their *assent* that the king appears to have required." 1 Spence Eq. 266.

law who were styled *justiciarii*, together with others sometimes specially summoned by writ from the chancellor's office.¹ This council was the great judicial centre of the kingdom, from which all justice emanated;—not that the council had, as a body, in the early stage of its existence, the attributes of a court, but simply because the supreme authority, including the supreme judicial power, was vested therein.² The term *curia regis*, as applied to the council, was used in the sense of the royal residence or household, frequented by the nobles and magnates of the realm, and where the king sometimes in person sat with the chief justiciary and chancellor, attending (among other things) to complaints of grievances, which were originally solely as to revenue.³ The same term (*curia regis*) was applied to the county courts, but in a different sense, as they were the *king's courts* of justice.⁴ The *curia regis*, or council, appears to have become in the reign of Henry I. the regular court of ultimate appeal from all the courts of ordinary jurisdiction.⁵ Out of this royal court or council, courts of justice (properly so called) of original jurisdiction gradually arose, and their origin and manner of growth appear to have been briefly as follows:—

The oldest court (in the strict sense of the term) whose existence can be distinctly traced is the Exchequer.⁶ The Exchequer was originally only an *office*, ordained for matters of the king's revenue; and where, subsequently, two knights (or barons), two clerks, and two learned men in the law, were assigned to hear and determine these matters. The persons so assigned were styled Barons of the Exchequer, the term employed to this day. In process of time common suits, *i. e.*, suits between subject and

¹ 1 Spence Eq. 329; 1 Foss's Judges, 10.

² "The *curia regis*," says Mr. Spence, speaking of the time of Glanville (A. D. 1179, 1180), "can hardly yet be considered as designating a distinct judicial tribunal; *concilium* and *curia* are sometimes used as synonymous even by Bracton." 1 Spence Eq. 119, note c.

³ 1 Reeves's Hist. of English Law, 85, Finlason's note. 1 Spence Eq. 102. Mr. Finlason's notes to Reeves' have been very severely criticized (see a notice by

Henrich Brunner, translated for the American Law Review of October, 1873, vol. viii., No 1), but his conclusions upon this point seem to be sound. See also article in Edinburgh Review, vol. 33, page 11.

⁴ 1 Reeves' Hist. Eng. Law 84, and note.

⁵ 1 Spence Eq. 107; 1 Foss's Hist. Judges, 9.

⁶ Edinburgh Review, vol. 33, page 11; notes to Reeves Hist. Eng. Law, vol. 1, page 85 (Finlason).

subject, came to be brought in the Exchequer, perhaps because it was felt that justice could be more impartially and learnedly administered by the Barons of the Exchequer than in the ordinary county courts.¹ Now, the court or household of the king was, it will be remembered, ambulatory; it accompanied the king in his journeys, and business, both legislative and judicial, was transacted at the different places where the court happened to be held. This, as is well known, was the occasion of great inconvenience so far as common suits or pleas were concerned, as the suitors were thus obliged to travel to different parts of the kingdom in order to obtain redress. Hence, the celebrated provision of Magna Charta enacted that common pleas should no longer follow the king, and hence the Court of Common Pleas arose as a distinct tribunal fixed by law at Westminster.

5. It has been already stated that the county courts, which were of criminal as well as civil jurisdiction, were retained after the conquest, owing to the popularity of these tribunals, and to the tenacity with which people clung to their old institutions.² These somewhat tumultuous courts (or assemblies, as they might more properly be called), were under the presidency of the sheriff, who was appointed by the king. Now, in order to insure a proper administration of the law, and to increase the royal influence, it became customary to appoint the sheriffs from the justices attached to the king's household, or *curia regis*;³ and sometimes men learned in the law were sent down by special commission to hold these courts. Hence it came to pass, that itinerant justices went down from the *curia regis* to the counties, and there held the county courts. But one step more was necessary to constitute a distinct tribunal of general jurisdiction, namely, that before the judge went down to try the cause, the exact matters in dispute should be settled, and the matters of law separated and determined. Hence the king's justices who

¹ See article in *Edinburgh Review*, vol. 33, page 12. The limits of the jurisdiction of the different courts were not, in early times, defined with very great precision. Thus the Court of Exchequer exercised jurisdiction as a court of equity, principally, however, in cases of tithes. This jurisdiction, however, never attained

any great importance, and was finally, by Stat. 5 Vic. c. 5, § 1, transferred to the Court of Chancery. Mitford's Pleading, 6.

² 1 Reeves's Hist. Eng. Law; Finlason's notes, 80.

³ *Id.* See also 1 Foss's Judges of England, 171, 189, 377.

met for this purpose, and who were afterwards despatched into the different counties, to preside over the trial of the issues thus made up, came to constitute a distinct tribunal, the King's Bench. To this tribunal also, the name of *curia regis* has been applied.¹ This result was probably brought about by Glanville, in the reign of Henry II.² In this way the *curia regis*, as it were, drew to itself and absorbed the jurisdiction of the county courts;³ and the vast increase of business, consequent upon this change, although not the *origin* of the Court of King's Bench, was one of the *reasons* for its distinct and separate existence.

To return to the ordinary council, or household of the king. The council accompanied the king in his movements; and writs for the redress of grievances were made returnable—*i. e.*, the cause was to be heard—before the king wherever he should be in England.

Over the ordinary council, a great officer of state, the chief justiciary of all England, presided. His position in the realm was next in rank to that of the sovereign; and in the absence of the latter from the kingdom, the chief justiciary acted as regent. As is well known, this great office was discontinued in the reign of Henry III.⁴

6. The chancellor was the secretary of the king,⁵ and probably acted as the secretary of the council. From his office (the chancery) issued the writs which authorized suitors to bring their complaints before the king's courts. For, in the ordinary administration of justice, no action could be brought in the king's court except such as concerned the king—the remedy between subject and subject being in the county and hundred courts. When, however, dissatisfaction came to be felt at the decisions of the local courts, the parties began to apply to the king's court, and obtained from the chancellor's department (the *officina brevium*), a writ applicable to their cases, and for which a fine was originally paid.⁶ This payment having be-

¹ See 1 Reeves's Hist. Law, Finlason's notes, 80, 89.

² *Id.*

³ 1 Foss's Judges, 171.

⁴ Foss's Hist. of Judges, vol i. p. 11.

⁵ 1 Foss's Hist. Judges, 18.

⁶ The Norman government would be likely to encourage such applications, in order to do away with the local courts, which were of Saxon origin.

come an instrument of injustice, the Great Charter provided that justice should no longer be denied or sold.

As the council still retained its general supreme authority, applications for relief were frequently made to that body when redress could not be otherwise obtained. In considering such applications, the advice of the chancellor would naturally be followed, as he was the king's secretary, was the keeper of his conscience (to which the petitions were addressed), and attended his person. The chancellor, moreover, was generally an ecclesiastic; and to churchmen, in those days, the learning of the civil law, to which the common law is so much indebted,¹ was principally confined. Besides, as from one branch of the chancellor's department, issued the writs by which injuries were ordinarily redressed, he would naturally be the most proper person to determine whether the case presented was one which would fall within the forms already in use, or which would call for the exercise of the extraordinary jurisdiction still held in reserve. In some cases, therefore, the answer to petitioners was, that they should have a writ out of chancery—in other words, they were sent to the King's Bench, or Common Pleas; in others, the Court of Exchequer was pointed out as the tribunal in which the cause would properly be cognizable; while in still a third, the suitor would obtain relief (through the hands of the chancellor) directly from the council in the exercise of its extraordinary jurisdiction.²

7. Of course if the Courts of King's Bench, Common Pleas, and Exchequer had been able and willing to redress every imaginable wrong, the reserve jurisdiction of the council never would have been called into play, and the Court of Chancery never would have grown into being. But the jurisdiction of each of the common law courts was circumscribed. Certain precise and rigid forms of action existed, which were supposed to effectually carry out the great maxim of justice *ubi jus ibi remedium*; but which in point of fact were not sufficiently comprehensive to do so. No common law writ, for example, existed by which a defective instrument could be reformed, a fraudulent conveyance

¹ See Bracton and his Relation to the Roman Law, by Guterbock; Coxe's Translation.

² 1 Spence Eq. 330.

set aside, a mistake or accident effectually relieved against, or a beneficial interest in property be enforced as against the holder of a legal title. Hence many injuries must necessarily and actually did exist, for which the common law courts furnished no appropriate redress; and therefore it was that, finding no relief in the King's Bench or Common Pleas, the suitor was compelled to throw himself upon the grace and compassion of the king and council. Two or three circumstances concurred to render this extraordinary jurisdiction liable to increase: first, the tendency of the common law rules to hardness and rigidity by reason of the deference paid to precedents; secondly, the refusal of the common law to adopt that part of the Roman law which may be called equitable, as distinguished from that which is merely *stricti juris*;¹ and finally, the desire to increase the dignity and importance of the office of chancellor, which grew to great proportions after the abolition of the office of Chief Justiciary, whereby an ambitious holder of the great seal would naturally be led to give redress by virtue of his extraordinary jurisdiction, rather than by directing a writ to be issued to bring the cause before the ordinary tribunals.

It was, most probably, to mitigate the rigors of the common law courts, and at the same time to check the growing jurisdiction of the chancellor, that the famous statute of Westminster the First was passed, authorizing the issuing of writs in *consimili casu*. The inability or the unwillingness of the chancery clerks to avail themselves of the provisions of the statute to any considerable extent, prevented the common law courts from extending their jurisdiction so as to cover the whole field of remedial justice, and still rendered it necessary for the suitor to apply elsewhere for extraordinary relief.² This extraordinary relief, whereby redress was given to those who were without remedy in the ordinary courts of the realm, was at first administered by the council upon petition addressed to them. Applications of this nature were, in fact, invocations upon that reserve force of justice which still resided in the *curia regis*, ready, when occasion required, to be called into play. Its exercise was of favor, not of right; and

¹ 1 Spence Eq. 206, 346, 347.

cellor would have gone if actions on the

² It is difficult to imagine, however, to what extent the jurisdiction of the chan- case had never been invented.

hence those matters in which it was displayed were called emphatically "matters to be granted as of grace."

When exactly it was that these applications came to be made to, and the redress consequent thereupon came to be afforded by, the chancellor alone, is an historical question involved in some doubt. Certain it is, that as early as the reign of Edward I. an ordinance was issued for the purpose of relieving the king from the business of attending to petitions addressed directly to him, whereby it was provided that "all petitions touching the seal do come first before the chancellor;" and (providing, as it were, for an appeal to the king in great cases), "if the demands be so great and so much of grace that the chancellor and those others cannot do without the king, then they shall bring them before the king to know his will."¹

A more direct recognition of the chancellor as the proper person by whom the extraordinary jurisdiction in *matters of grace* was to be administered, is contained in a writ of Edward III. addressed to the sheriffs of London, whereby suitors are specially enjoined to prosecute those affairs which are of grace before the chancellor, or the keeper of the privy seal.² In this reign the Court of Chancery ceased to follow the king.³

The natural consequence of these efforts on the part of the king to delegate this branch of judicial authority to the chancellor, would be that petitions for relief would come in time to be addressed directly to that officer. This result, in fact, shortly followed, and in the reign of Richard II. the practice of presenting a petition to the chancellor in the first instance was firmly established.⁴

8. The general ground for equitable relief was then, as it pro-

¹ Haynes's Outlines of Equity, 40.

² Haynes's Outlines of Equity, 44; 1 Spence Eq. 337. In the same reign the Court of Chancery as a court of *ordinary* jurisdiction became of great importance. This jurisdiction included pleas of *scire facias* for repeal of letters patent; of petition of right and *monstrans de droit* for obtaining possession or restitution of property from the Crown; traverses of offices, and some others. 1 Spence Eq.

336. In the exercise of his ordinary or common law jurisdiction, the chancellor could not advert to matters of conscience. *Id.* 337.

³ Spence Eq. 340.

⁴ A small portion or fragment of equity jurisdiction had, as has been already stated, drifted into the Court of Exchequer, where it remained until Stat. 5 Vic. c. 5, § 1. See *ante*, page 5, note.

fesses to be now, either the failure of the common law courts to recognize a right, or their inability to enforce it.

One of the most frequent cases in which this general doctrine of equitable relief was applied, was the inability of poor or lowly suitors to enforce their rights in common law actions, either as plaintiff or defendant, against the rich and powerful.¹

The interference of the chancellor is invoked, in many instances, solely upon the ground of *personal* inability to obtain justice as against a powerful adversary.

While, with the changed condition of society, the state of things which gave rise to and required this interference on the part of the chancellors has long ago passed away, and the jurisdiction itself has therefore fallen to the ground, it is still useful to recur to it, in order to show the theory upon which courts of equity have always acted from the earliest times, namely, the desire to supply deficiencies, no matter for what cause, in purely legal remedies.

Another class of cases in which the extraordinary interposition of the chancellor was called for was that of *trusts*, which was the term used when the legal title of property was held by one man, upon the confidence that another should have the right to its beneficial enjoyment. The origin and progress of trusts will be more particularly noticed hereafter. They were emphatically matters of conscience, and, therefore, fell strictly within the scope of the chancellor's extraordinary jurisdiction.

Besides these two classes of cases, many others existed in which the chancellor interfered.

The following instances, taken from the Chancery Calendar, may be cited as illustrative of the nature and extent of the extraordinary jurisdiction of the High Court of Chancery, during the period which extended from the termination of the reign of Edward III. to the reign of Henry VIII. Specific performance of a contract;² specific delivery of a ship and cargo wrongfully detained;³ delivery for cancellation of documents obtained by

¹ See *Godard v. Ingepenne*, 1 Chan. Cal. viii.; *Thomas v. Wyse*, *Id.* xiv.; *Belle v. Savage*, *Id.* xiv.; *Royall v. Garter*, *Id.* cxxx.

² *Kymburley v. Goldsmith*, Chan. Cal. xx.

³ *Bonodyn v. Arundell*, Chan. Cal. xxxviii. This appears to have been by virtue of the former jurisdiction of the Chancellor in Admiralty, long since obsolete. See 1 Spence Eq. 703.

force;¹ relief against a forged power of attorney;² injunction to restrain a nuisance, said nuisance being a stoppage of a water-course;³ for an injunction to stay proceedings at law;⁴ to recover deeds and other evidence unjustly retained by the defendant in his possession;⁵ for permission to go on with a suit at law from which the plaintiff had been restrained by an injunction;⁶ because the plaintiff is disturbed in his manor by the defendant falsely claiming an annuity charged on the land;⁷ to restrain a defendant from the use of witchcraft;⁸ to assign dower to a poor widow;⁹ because the defendant had through envy thrown down the plaintiff's house;¹⁰ for relief against maintenance;¹¹ for quiet possession;¹² for discovery;¹³ to set aside a conveyance obtained from the complainant when intoxicated;¹⁴ for tithes;¹⁵ to restrain harassing litigation;¹⁶ to set aside a release obtained by a trick, and to enjoin the defendant from using it in an action at law.¹⁷

In *Geffry Downham v. Heylyn ap Blethyn*,¹⁸ the defendant is alleged to have wrongfully obtained letters of presentation to a benefice. For this there was a legal remedy by *scire facias*; but the complainant seems to have thought himself justified in seeking equitable relief on the simple ground of failure or delay on the part of the common law courts. "He hath sued," says the petition, "for the same cause from term to term at Nottingham, York, Winchester, and London, without success."

Broddesworth v. Coke,¹⁹ which occurred in the reign of Edward IV., is a case which strikingly illustrates the progress which equitable jurisdiction was making. It was a bill setting forth an agreement by which the complainant was to convey certain lands,

¹ *Pickering v. Tongue*, Chan. Cal. xlv; *Lord Berkley v. The Countess of Shrewsbury*, Chan. Cal. lxxvi.; *Brown v. Lord Say's Widow*, *Id.* xlvii.

² *Bief v. Dyer*, *Id.* xi.

³ *The Burgesses of East Retford v. Thomas de Hercy*, *Id.* ix. and x.

⁴ *Astel v. Causton*, *Id.* cviii.; *Edyall v. Hunston*, *Id.* cxiii.; *Peverell v. Huse*, cxxii.

⁵ *Thomas Reed and Emma his Wife v. The Prior of Launceston*, *Id.* cxiv.

⁶ *Royall v. Garter*, *Id.* cxxx.

⁷ *Hauley v. Tresilian*, *Id.* iii. iv.

⁸ *Hoigges v. Harry*, *Id.* xxiv.

⁹ *Danyell v. Belyngburgh*, *Id.* xxx.

¹⁰ *Saxby v. Laurence*, *Id.* xxxiii.

¹¹ *Bell v. Rawe*, *Id.* xxxvi.

¹² *Cullyer v. Knyvett*, *Id.* cxxxvii.

¹³ *Oxford v. Tyrell*, *Id.* cxx.

¹⁴ *Stonehouse v. Stanshaw*, *Id.* xxix.

¹⁵ *Arkenden v. Starkey*, *Id.* xxxv.

¹⁶ *Freeman v. Poutrell*, *Id.* xiii.

¹⁷ *Cobbethorn v. William*, *Id.* ii.

¹⁸ 1 Chan. Cal. ii.

¹⁹ *Id.* lxvii.

goods, and *tailles*¹ to the defendant for the purpose of making a settlement with the complainant's creditors, and to secure advances to be made by the defendant; and that afterwards, upon the solicitation of the defendant, an absolute conveyance was executed, although it was intended that the transaction should be a mortgage. The prayer of the bill was for an account and reconveyance. The bill was dismissed, because, as to the lands, the evidence of the conditional character of the conveyance was insufficient, and as to the goods and *tailles* the complainant had a remedy at law.

In the above case it will be observed that many well-known equitable doctrines are recognized. In the first place an absolute conveyance is alleged to be a mortgage, and the *fraud* of the defendant in taking advantage of its absolute form contrary to the true intention of the parties, and to his promise, is set forth as a ground for equitable relief. The defendant, moreover, is in substance alleged to be a *trustee* for the benefit of the complainant's creditors, and as such liable to answer before a court of equity. The relief sought is in accordance with the redress which a chancellor at the present day would give in such a case if it were properly proved, viz., an account showing how the trust assets had been administered, and a reconveyance of so much of the real estate as had not been employed for the purposes of the trust. The decree of the court is also in accordance with modern principles; for when actual *fraud* is alleged it cannot be presumed, but must be proved; whereas in the present instance the complainant seems to have been unable to make out his case. And as to the goods and *tailles*, the bill seems to have been rightly dismissed, because for those the complainant had a complete common law remedy.

9. From the above brief sketch of the rise of the jurisdiction of the English Court of Chancery three things are plain:—

First. That, in the earliest times of the English constitution, there was felt a want of judicial relief outside and beyond that which was afforded by the common law courts of the King's Bench, Common Pleas, and Exchequer.

Second. That in consequence of this want, and for the purpose

¹ Acquittances.

of supplying it, appeals were made to the king, as the head and fountain of all justice, sometimes in parliament, sometimes in council, and sometimes in person; and that these applications, from the circumstance of having been referred from time to time to the chancellor, came at last to be presented to that official in the first instance; and

Third. That relief was afforded upon these petitions only in those cases wherein the common law courts either could give no redress at all, or could give no adequate redress; and that while in some of these cases the necessity for the interposition of a chancellor has passed away, in others the principles then enforced have furnished the foundation upon which the modern jurisdiction of courts of equity has been built.

The *process* in equity was a subpoena, issued by the chancellor, in the name of the king, whereby the party was summoned to appear and answer the complaint of the plaintiff, and abide by the order of the court. It is commonly supposed to have been invented by John de Waltham, keeper of the seal under Richard II., and it is so stated in the complaint made by the commons to Henry V.; but this is doubtless an error, as an instance of the writ is found in 37 Edward III.; and de Waltham was not Master of Rolls until the fifth year of Richard II.¹

10. The jurisdiction above described was not exercised without opposition. In the successive reigns of Richard II., Henry IV., Henry V., and Henry VI., petitions were from time to time presented by the commons setting forth encroachments upon the common law, complaining that men were brought before the council in matters which were remedial at law, and (in two instances) inveighing against the use of the subpoena. The jurisdiction of the chancellor and the council was, however, upheld by the sovereign; and the obnoxious writ was not abolished.

In the reign of Henry VIII. a statute was passed, which threatened at first to remove a large portion of the jurisdiction of the chancellor by destroying a species of property which had hitherto been solely recognizable in his court, namely the *Use*.

By the celebrated Statute of Uses (27 Henry VIII., c. 10) this estate in the land (the use) which had hitherto been recognized

¹ See 1 Spence Eq. 333, note b.

solely in a court of equity, was clothed with a legal title, and thereby rendered a proper subject for the recognition of a common law court. The nature of the use, and the effect of the statute, will be explained hereafter. It will be sufficient to say, at present, that the threatened blow at the jurisdiction of chancery was averted by an ingenious construction of the statute, whereby these equitable estates were rescued from destruction, and their control still retained in the court where they had originated.

In the reign of James I. another attempt was made to interfere with the jurisdiction of the chancellor. An action was tried before Coke in which the plaintiff lost the verdict in consequence of one of his witnesses being artfully kept away. He then had recourse to chancery to compel the defendant to answer on his oath, which the latter refused to do, and was committed for contempt. Coke then had indictments preferred against the parties to the bill, their counsel and solicitors, for suing in another court after judgment obtained at law, which was alleged to be contrary to the statute of premunire.

The matter was referred to the king, whose decision was in favor of the lord chancellor.¹

From that time to the present the jurisdiction of the Court of Chancery has been free from interference, and has expanded into a wise and comprehensive system of justice. This system has been perfected by the hands of many illustrious men who have sat upon the woolsack—among whom are to be mentioned Nottingham, Hardwicke, Eldon, St. Leonards, Westbury, and Selborne.

Courts of common law, in modern times, have afforded relief in many cases which formerly fell under the cognizance of chancery alone, but the latter tribunal has not, on that account, abandoned the jurisdiction which it had acquired, and the suitor has now, not unfrequently, two tribunals open from which he may obtain redress.

The choice between the two tribunals in England has been, of late years, greatly affected in favor of the Court of Chancery, by reason of the vast improvements which have been introduced in the constitution of the equity courts and the practice therein. The jurisdiction formerly administered by the chancellor alone

¹ Earl of Oxford's Case, 1 Ch. Rep. 1; 2 Lead. Cas. Eq. 504 (601, 4th Eng. Ed.).

came, by various statutes, to be vested in seven judges, viz., the Lord High Chancellor, two Lords Justices of Appeal, the Master of the Rolls, and three Vice-Chancellors; and many improvements were introduced tending to the prompt and economical administration of justice.

11. The system, however, of two distinct sets of courts administering different and sometimes conflicting rules, has at last ceased to find favor in England. On the fifth of August, 1873, an Act of Parliament was passed under the title of the "Supreme Court of Judicature Act," whereby the constitution of the English courts was radically changed. By this act (which, it was declared, should come into operation on the second day of November, 1874) it is provided that the Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy shall be united and consolidated, and shall constitute one Supreme Court of Judicature, to consist of two divisions under the name of "Her Majesty's High Court of Justice," and "Her Majesty's Court of Appeal." It is further provided that the judges of the High Court of Justice shall not exceed twenty-one in number; and that the Court of Appeals is to consist of five *ex officio* judges, and so many ordinary judges (not exceeding nine at any one time) as may from time to time be appointed. The *ex officio* judges are the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer. The act further provides that if the plaintiff claims any equitable estate, or right, or relief upon any equitable ground, or equitable relief upon a legal right, the said courts and every judge thereof shall give the same relief as ought to have been given by the Court of Chancery before the passing of the act; and that if a defendant claims any equitable estate or right, or relief upon any equitable ground, or alleges any ground of equitable defence, the said courts and every judge thereof shall give the same effect to every estate, right, or ground of relief so claimed, and to every equitable defence so alleged, as the Court of Chancery ought to have given in proceedings in that court before the passing of the act. Other pro-

visions also exist, whereby equitable titles and rights are directed to be recognized, and equitable remedies substantially applied.¹

It will be observed that by the provisions of this act, the principles of justice as administered in the Court of Chancery have been made to pervade the whole mass of English jurisprudence, and that, in fact, by the rules growing out of those principles, all questions of justice in England are hereafter to be determined.

12. It has been already stated that the principles of justice as administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction, have been adopted in nearly all, it would not be too much to say in *all*, of the United States. While this is true, it must be remembered that the practical application of these principles through the machinery of the courts has varied very much throughout the Union, and has received many modifications at different periods.

13. The federal courts have equity powers within the scope of the jurisdiction conferred upon them by the constitution.

By the Constitution of the United States² it is provided that the judicial power of the federal government shall extend to all cases at law or in *equity* arising under the constitution and laws of the United States, and treaties made or which shall be made under their authority. This jurisdiction, as explained in the judiciary act, is not to be exercised in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law;³ but this enactment is declaratory merely of the existing law.⁴ It has also been said that the practice of the English High Court of Chancery forms the basis of the equity practice of the courts of the United States.⁵

14. After the separation of the American colonies from the British Crown, the constitutions of many of the States provided for the establishment of courts of chancery, after the model of the High Court of Chancery in England.⁶ Such was the case in

¹ Stat. 36 and 37 Vic. c. 66. L. R. 8 Stats. 306, 317, 319.

² Art. III. Sect. 2.

³ Act of 1789, § 16. 1 Stat. at Large, 82.

⁴ *Boyce v. Grundy*, 3 Pet. 210; *Oelrichs v. Spain*, 15 Wal. 228; *Grand Chute v. Winegar*, *Id.* 376; Laussat's note to Fonblanque's Equity, 12.

⁵ *Smith v. Burnham*, 2 Sumner 612, 625.

⁶ A court of chancery had existed for a short time in Pennsylvania between the years 1720 and 1739. See Rawle's Essay on Equity in Pennsylvania. Courts of chancery had also existed prior to the Revolution in most of the colonies. See

New York, New Jersey, Maryland, Delaware, South Carolina, and also Michigan.

In other States, as in Pennsylvania, there were no separate courts of chancery, and the equity powers conferred upon the common law courts were exceedingly limited. Changes were, however, made from time to time in most of the States. In 1840 the State convention which revised the Constitution of New York, abolished the courts of chancery, and conferred upon the Supreme Court a general jurisdiction in law and equity; while, on the other hand, in Pennsylvania enlarged equity powers were conferred upon the courts in obedience to the suggestions contained in the report of the committee to revise the civil code, made in 1835.

The example of New York, in abolishing the distinction between legal and equitable forms of action and substituting a general form of civil action in their place, has been followed by very many of the western States of the Union,¹ and even the State of South Carolina, so justly celebrated for the learning and ability of its chancellors, has given in its adherence to the new system, and has adopted a code whereby separate courts of equity are abolished, and all civil injuries are redressed by one form of action.²

But even in those States where this sweeping change has been effected, it has still been found necessary to make provisions for certain equitable remedies, the absence of which would inevitably result in a failure of justice in many cases. Thus, injunctions

Laussat's note to 1 Fonblanque's Equity, 13.

¹ "This system was introduced, even down to its details, into Ohio, in 1853; into Missouri in 1850; into California in 1851; into Minnesota in 1851; into Wisconsin in 1857; into Oregon, in law, in 1854; into Indiana, with a slight departure in detail, in 1852; into Kentucky, with a departure precluding equity cases from being united with law cases, in 1851. It was recommended in a code prepared by commissioners from the District of Columbia in 1857. It was introduced into Iowa, in spirit, with much departure from the let-

ter, in 1851. It is the law also of Kansas, Nebraska, Utah, and Washington Territories. Alabama in 1852, Massachusetts in 1852, Tennessee in 1858 (but now in Tennessee, see Constitution of 1870), Texas and Mississippi at a date unknown to us, also introduced reforms based more or less upon these *reports*, while Maryland, in 1856, introduced an act which is mainly a *literal copy* of the provisions of the English act of 1852." (Report of Commissioners on Civil Practice, Rev. Stats. of Iowa, 446.)

² Rev. Stats. of 1873, p. 586.

and writs of *ne exeat* are issued, specific performance enforced, and receivers appointed, upon applications not made according to the course and practice of chancery, but under common law or statutory forms;¹ and relief which falls under the *quia timet* jurisdiction of equity is afforded through the medium of a petition or complaint.²

15. In considering this subject, therefore, the States of the Union may be conveniently divided into three groups or classes.

The first embraces those States wherein distinct courts of chancery exist; and includes New Jersey, Maryland, Kentucky, Delaware, Tennessee, Mississippi, and Alabama.³

¹ This is the case in California (Wood's Digest, 168, 933; Parker's Supplement, §§ 9172); New York; Ohio (Code, § 3); South Carolina (Rev. Stats. of 1873, 586); Missouri (Wagner's Digest, 1872, pp. 999 and 1028); Wisconsin (Taylor's Statutes, 1416); Kansas (Code, Chap. 80, Art. II., § 10); Minnesota (Chap. 66 of the Code, Title I., § 1); Indiana (Code, Part II., Chap. I., Art. 1).

² Statutes of California, Parker's Supplement, § 9172.

³ In New Jersey a court of chancery is created by Art. VI., Sec. I., of the Constitution; and Sec. IV. of the same article provides that "the Court of Chancery shall consist of a chancellor." In 1871 the office of vice-chancellor was created. In Maryland the Constitution provides for the appointment of a chancellor. In Kentucky courts of chancery are established in certain districts. (1 Rev. Stats. of Kentucky, 343.)

In Delaware the Constitution, by Article VI., §§ 2 and 5, provides that there shall be a chancellor of the State, and that he shall hold the Court of Chancery.

By the revised code, the Court of Chancery shall have full power to hear and decree all matters and causes in equity, and the proceedings shall be as heretofore, by bill, answer, and other proper pleadings; and the chancellor shall have power to issue subpoenas, and

all other process to compel defendants to answer suits there, to award commissions for taking answers and examining witnesses, to grant injunctions for staying suits at law and to prevent waste, as there may be occasion, according to the course of chancery practice in England, with power to make orders and award process, and do all things necessary to bring causes to hearing, and to enforce obedience to decrees in equity by imprisonment of the body or sequestration of lands.

Provided, that the chancellor shall not have the power to determine any matter wherein sufficient remedy may be had by common law or statute, before any other court or jurisdiction of this State; but that where matters determinable at common law shall be brought before him in equity, he shall remit the parties to the common law; and when matters of fact, proper to be tried by a jury, shall arise in any cause depending in chancery, the chancellor shall order such facts to trial by issues at the bar of the Superior Court. (Title xiv., Chap. 95, § 1.) In Tennessee, by the Constitution of 1870, the judicial power of the State is vested in one supreme court, and in such circuit, chancery, and other inferior courts as the legislature shall from time to time ordain and establish. The chancery courts are held by the chancellor.

The second class is composed of those States wherein chancery powers are exercised by judges of common law courts, but according to the course and practice of chancery. These States are Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, Virginia, West Virginia, North Carolina, Georgia, Illinois, Texas, Florida, Michigan, Iowa, Arkansas, and Oregon.¹

They have original exclusive jurisdiction of all cases of an equitable nature, where the debt or demand exceeds fifty dollars, unless otherwise provided by this code.

They have concurrent jurisdiction over the persons and estates of idiots, lunatics, and other persons of unsound mind; over the persons and estates of infants, and of the appointment and removal of guardians; for the abatement and recovery of usury; in all proceedings for divorce; for partition of estates; for sales of estates by personal representatives, guardians, heirs, or tenants in common; for sales of land of decedents, at the instance of creditors, for the payment of debts; in arbitration and agreed cases; and, in some cases, in the appointment of administrators. (Thompson and Steger's Digest, §§ 4280, 4298, 4299, 4300, 4301, 4302, 4303, 4304.)

In Mississippi it is provided by the Constitution (Art. IV., § 16), that a separate superior court of chancery shall be established with full jurisdiction in all matters in equity; and by statute the superior court of chancery has jurisdiction over all matters, pleas, and complaints whatsoever belonging to or cognizable in a court of equity. (Howard and Hutchinson, 505.)

In Alabama the powers and jurisdiction of courts of chancery extend:—

1. To all civil causes in which a plain and adequate remedy is not provided in other judicial tribunals.

2. To all cases founded on a gambling consideration, so far as to sustain a bill of discovery and grant relief.

3. To subject the equitable title or claim to real estate to the payment of debts.

4. To such other cases as may be provided for by law.

Chancellors may exercise the extraordinary jurisdiction granted to that office by the common law in cases of necessity, when adequate provision has not been made for its exercise by some other officer, or in other courts; and with the exceptions, limitations, and additions imposed by the laws of this State. (Code of Alabama, §§ 602, 603.)

¹ In Maine the Supreme Judicial Court has jurisdiction as a court of equity in the following cases:—

1. For the redemption of estates mortgaged.

2. For relief against penalties and forfeitures, civil and criminal.

3. To compel the specific performance of written contracts.

4. To relief in cases of fraud, trusts, accident, or mistake.

5. In cases of nuisance or waste.

6. In cases of partnership and part-owners.

7. The construction of wills and administration of trusts.

8. Discovery in the cases before named, and in cases where the power is specially given by statute.

Writs of injunction may be issued in

The third class of States includes, it is believed, all those which have not been mentioned as falling within the other two

cases of equity jurisdiction, and when specially authorized by statute. (Rev. Stats. 1857, pp. 468-469.)

In New Hampshire it is provided that the Supreme Court shall have the powers of a court of equity in cases cognizable in such court, and may hear and determine according to the course of equity, in case of charitable uses, trusts, fraud, accident, or mistake; of the affairs of copartners, joint tenants or owners, or tenants in common; of the redemption and foreclosure of mortgages; of the assignment of dower; of contribution; of waste and nuisance; of specific performance of contracts; of discovery, where discovery may be had according to the course of proceedings in equity; and in all other cases where there is not a plain, adequate, and complete remedy at law, and such remedy may be had by proceedings according to the course of equity; and may grant writs of injunction whenever the same are necessary to prevent fraud or injustice. (Sec. 1.)

When goods or chattels are unlawfully withheld from the owner, proceedings in equity may be had for a discovery, for a restoration of the property, and for such other relief as the nature of the case and justice may require. (Sec. 2.)

When any estate, property, interest, right, or credit, legal or equitable, of a debtor against whom execution has been issued and returned unsatisfied, is alleged to be so holden that it cannot be reached to be taken on the execution by levy or by suit on the judgment, that it has been conveyed by him in fraud of his creditors, or is held by others for his use, proceedings in equity may be had for a discovery and for relief; and the court shall make proper decrees and orders and issue proper process to compel a discovery, to prevent the transfer of such

estate, property, interest, right, or credit, and to make application of so much thereof as in justice ought to be so applied in satisfaction of the debt. (Sec. 3.)

The provisions of the preceding section shall not apply to property exempt by statute, or to trust property where the trust has been created by a party other than the debtor, and the application would be inconsistent with the trust. (Sec. 4, Gen. Stats. 1867, 388.)

In Vermont a court of chancery is constituted, the powers of which are vested in a chancellor.

Each judge of the Supreme Court is a chancellor; and within the judicial circuit for which he is designated according to law, has and exercises all the jurisdiction and powers which are vested in a court of chancery. (Rev. Stats. 1839, 149.)

In Massachusetts the Supreme Judicial Court has original and exclusive jurisdiction of every original process, whether by bill, writ, petition, or otherwise, in which relief in equity is prayed for, except when a different provision is made; and may issue all general and special writs and processes required in proceedings in equity to courts of inferior jurisdiction, corporations, and individuals, when necessary to secure justice and equity.

The court may hear and determine in equity all cases where the parties have not a plain, adequate, and complete remedy at the common law, that is to say—

Suits to redeem or foreclose mortgages; trusts; specific performance of written contracts; suits to compel the redelivery of chattels withheld in such a manner that they cannot be replevied; contribution and other cases of adjustment; suits between copartners, joint-tenants, and tenants in common, with authority to appoint receivers, and between joint trus-

classes. In these States the distinction between actions at law and suits in equity has been abolished; but, as has been already

tees, coexecutors, and coadministrators; waste and nuisance; accounts which cannot conveniently be adjusted at law, creditors' bills; fraud and conveyances, in the nature of mortgages; accident and mistake; discovery; and full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate, and complete remedy at law. (Gen. Stats., pp. 558, 559.)

In Rhode Island the Supreme Court has the powers of a court of equity. (Rev. Stats. of 1872, 27, 404.) In Connecticut the Supreme and Superior Courts have jurisdiction in equity. They have power to proceed according to the rules, usages, and practice of chancery; and shall take cognizance only of such matters in which adequate relief cannot be had in the ordinary course of law. Special provisions also exist upon the subject of injunction, mortgages, account, partnership, and partition. (Rev. Dig. of 1866, 217, 220, 387; Laws of 1867, p. 74; Laws of 1869, p. 330.)

By the Constitution of Pennsylvania (Art. V., § VI.), the Supreme Court and Courts of Common Pleas, besides the powers heretofore usually exercised by them, have the power of a court of chancery so far as relates to the perpetuating of testimony, the obtaining of evidence from places not within the State, and the care of the persons and estates of those who are *non compos mentis*; and the legislature is directed to vest in the said courts such other powers to grant relief in equity as shall be found necessary . . . or vest them in other courts.

By the act of 1836 and subsequent statutes, equitable jurisdiction was conferred in the following cases—besides those mentioned in the Constitution, viz.:—

The control, removal, and discharge of trustees, and the appointment of trustees and the settlement of their accounts.

The supervision and control of all corporations other than those of a municipal character, and unincorporated societies or associations and partnerships.

The care of trust moneys and property, and other moneys and property made liable to the control of said courts.

The supervision and control of partnerships and corporations other than municipal corporations.

Discovery; interpleader; injunction to restrain acts contrary to law and prejudicial to the interests of the community and rights of individuals.

Specific relief when recovery in damages is inadequate; fraud (actual or constructive); accident and mistake; account; dower; partition and disputed boundaries; mines; apportionment of wharfage and dockage; plank-roads. (1 Brightly's Purd. Dig. 589.) The proposed Revision of the Constitution makes no change in this respect.

In Virginia the County and Circuit Courts have jurisdiction in law and equity. The proceedings on the equity side are according to the course and practice of chancery; and various equitable remedies are expressly provided for by statute. (See Code of 1860.) In West Virginia similar provisions exist.

In North Carolina it is provided that each superior court of law shall also be a court of equity for the same county, and possess all the powers and authorities within the same, that the Court of Chancery which was formerly held in this State under the colonial government used and exercised, and that are properly and rightfully incident to such a court. (Rev. Code, 187.)

The Georgia Code provides that the su-

stated, certain equitable remedies are still administered under the statutory form of the civil action.

Whatever modifications have been introduced by statute into

perior courts in the several counties shall exercise the powers of a court of equity in all cases where a common law remedy is not adequate to compel discovery, to discover transactions between copartners and co-executors, to compel distribution of intestate estates and payment of legacies, to discover fraudulent transactions for the benefit of creditors.

Parties need not sue in equity unless they think it necessary to search the conscience of defendant.

If they have commenced a common law action they may, nevertheless, invoke the aid of equity for discovery.

In Texas there are no separate equity courts. General jurisdiction at law and in equity is conferred upon certain courts. The proceedings are by petition; and parties may be compelled to answer interrogatories. (Oldham's Dig. Title "District Courts.")

In Illinois the circuit courts have jurisdiction as courts of chancery. (Statutes, pp. 69, 70.)

In Florida the general assembly has power to establish and organize a separate court or courts of original equity jurisdiction, but until such court or courts is established and organized the circuit courts are to exercise such jurisdiction. (Const., Art. 5, § 8.)

By statute it is provided that no writ of injunction or *ne exeat* shall be granted until a bill be filed praying for such writ, except in the special cases and for the special causes in which such writs are authorized by the practice of the courts of the United States exercising equity jurisdiction. (Stat. of 1828, Thompson's Digest, 453.)

The issuing of writs of injunction to stay proceedings at law, and of writs of

ne exeat, is also made the subject of regulation.

In Michigan the office of chancellor is now abolished, and the several circuit courts of the State are constituted courts of chancery. Their powers and jurisdiction in and for the respective counties shall be coextensive with the powers and jurisdiction of the Court of Chancery in England, with the exception, additions, and limitations created and imposed by the Constitution and law of this State. (Compiled Laws, pp. 1006, 1009.)

In Iowa it is provided that the judicial power shall be vested in a supreme court, district court, and such other courts inferior to the Supreme Court as the general assembly may from time to time establish.

The chancery jurisdiction of the Supreme Court is appellate only.

The district courts are courts of law and equity. (Constitution, Art. V.)

The proceedings in a civil action may be of two kinds: first, ordinary; second, equitable. The plaintiff may prosecute his action by equitable proceedings in all cases where courts of equity, before the adoption of this code, had jurisdiction, and *must* do so in all cases where such jurisdiction was exclusive. (Code of 1860, §§ 2610, 2611.)

In Arkansas the circuit courts have jurisdiction in matters of equity. (Constitution, Art. VI., § 6.)

In Oregon the enforcement or protection of a private right, or the prevention of or redress for an injury thereto, shall be obtained by a suit in equity, in all cases where there is not a plain, adequate, and complete remedy at law.

The courts are a supreme, circuit, and county courts, having general jurisdiction. (Code, § 376; Gen. Laws, 243.)

the *forms* of relief, the system of justice which is administered in courts of equity, must of necessity enter into the laws of every civilized state whose institutions are derived directly or indirectly from England; and no State in the Union, however widely it may depart from the practice of the English High Court of Chancery, can discard the principles upon which its extraordinary jurisdiction is founded.

CHAPTER II.

GENERAL OUTLINE OF EQUITABLE JURISDICTION.

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| 16. Three great divisions of equity. | 28. Equitable liens. |
| 17. Equitable titles; example. | 29. Specific Performance. |
| 18. Equitable rights; example. | 30. Injunctions. |
| 19. Equitable remedies; example. | 31. Re-execution; Reformation; Cancellation. |
| 20. Subjects of equitable jurisdiction;
Trusts. | 32. Account; Dower; Partition; Confusion of boundaries; Rent. |
| 21. Mortgages. | 33. Partnership bills; Creditors' bills; Administration suits. |
| 22. Assignments. | 34. Infants, idiots, and lunatics. |
| 23. Accident and Mistake. | 35. Discovery; Commissions to examine witnesses abroad; Perpetuation of testimony; Examinations <i>de bene esse</i> . |
| 24. Fraud. | 36. Bills <i>quia timet</i> ; Receivers; Writs of <i>ne exeat</i> ; Writs of <i>supplicavit</i> . |
| 25. Notice; Estoppel; Election. | |
| 26. Conversion. | |
| 27. Adjustment; Set-off; Contribution; Subrogation; Exoneration; Marshalling. | |

16. It is trusted that the sketch already given of the rise of the High Court of Chancery in England, and of the reasons for its assuming the exercise of its extraordinary jurisdiction, have made it apparent that the subjects or heads of chancery jurisdiction are susceptible of division into three general classes; the first embracing those cases in which common law courts do not recognize a title; the second, those in which the common law courts do not recognize a right; and the third, those cases in which the common law courts cannot enforce a right, or cannot enforce it so as to do complete and exact justice.¹

¹ See Spence Eq., Part II., Book III., Chap. I.

It will be convenient to give an illustration of each of these general subdivisions of equity.

17. Equity recognizes titles which were entirely ignored at common law.

Thus, for example, it is well known that a *chose in action* could not be assigned at common law. The assignee had no standing whatever in a common law court: the assignment was null: he simply took no title whatever. In equity, however, whenever the assignment was founded upon a valuable consideration, and when it would therefore be unfair to allow a person to pay value without getting a substantial equivalent, an entirely new title was created, distinct from and independent of the legal title, which still remained in existence, but was held by the assignor solely for the benefit of the assignee. The method of asserting this equitable title was by allowing the assignee to use the name of the assignor in an action at law to recover the *chose*, and by restraining the latter from any interference in this suit. If the assignor refused to allow his name to be used, or any other reason existed which called for the direct interposition of chancery, the assignee was entitled to file a bill in equity, and his title to the *chose* was immediately recognized and enforced.

Here, then, is a case in which equity creates and enforces a title not known at law.

18. Again: the enjoyment, devolution, and transmission of legal titles are sometimes controlled by equitable doctrines, so that the rights of parties thereto may be very different in courts of equity from those to which a court of law would give effect. For instance, a guardian purchases property of his ward the day after the latter attains his majority. Here is a transaction by which the legal title to the property passes, and after which the rights of the parties, *at law*, are fixed. But equity views such a bargain with a jealous eye; and, in fact, has laid down the imperative rule that it cannot stand if the ward within a reasonable time chooses to disaffirm it. In equity, therefore, the ward may obtain a restitution of the property (upon the return of the consideration), not, indeed, because in chancery any new title is created, but because by the application of an equitable doctrine, the legal title is taken away from the person who at law would

be entitled to hold it, and restored to him who in good conscience should be the rightful owner.

19. Of the third general class of cases in which equity affords relief—those, namely, in which a court of law recognizes a right but cannot enforce it—in other words, those cases which fall under the head of equitable remedies—the doctrine of specific performance of contracts may be taken as an illustration. At law, if A. sells B. a piece of real estate, the legal title remains in the former until a deed is executed and delivered; and if he refuses to complete the sale, no power at common law can compel him to convey. B.'s right at common law (supposing the contract to be executed in such a way as to be binding) is simply a right of action on the contract by which damages may be recovered. Now, even if the case should happen to be one in which B. may recover damages in a common law action for the loss of his bargain,¹ it is obvious that his legal remedy is nevertheless wholly inadequate, and affords no substantial redress. He has a right to the property; he has a right which the law recognizes, because if the property is destroyed, the loss falls on him; but the common law is powerless to give him the thing itself for which he has bargained; it can only give him damages.

But in equity he has complete relief. Upon a bill being filed, and a proper case made out, the complainant is entitled to a decree that the defendant do convey to him the property in question on or before a certain day; and if the defendant disobeys the decree, his compliance therewith is enforced by an attachment—in other words, he is committed to prison until he executes the deed.

It will be observed, therefore, that the general field of the jurisdiction of courts of chancery is susceptible of three great divisions, viz., I. Equitable Titles; II. Equitable Rights, or Equities; and III. Equitable Remedies.

It will be convenient, however, not only to point out the above general subdivisions, but to give also a brief summary, or, as it were, catalogue of the subjects of equitable jurisdiction.

20. The first and perhaps the most important of these subjects is that of Trusts.

¹ For a discussion of the recent authorities upon this interesting point, see 1 Sug. V. & P. 542 (8th Am. Ed. by Perkins).

A Trust is the beneficial title or ownership of property of which the legal title is in another. The person in whom the legal title is vested is called the trustee, and the person for whose benefit the trust exists is called the *cestui qui trust*. So far as the duties of the trustee are concerned, trusts may be divided into active or special, and passive or simple trusts.¹ An active trust is one in which the trustee has some active duties to perform, such as to collect the rents and profits of an estate, and pay the net income to a married woman for her separate use; or to pay debts or legacies, or the like. A passive trust is one in which the trustee is the mere holder of the legal title, which he is compelled to convey to the *cestui qui trust* whenever he is called upon to do so. Trusts are also either executed or executory. An executed trust is one in which the estates and interests in the subject matter of the trust are completely limited and defined by the instrument creating the trust, and require no further instruments to complete them. An executory trust is where the instrument creating the trust is intended to be provisional only, and further conveyances are contemplated in accordance with the terms of the trust, and whereby the same may be effectually carried out.²

Trusts may also take their name from the purposes for which they are created, *e. g.*, trusts may be either private or public trusts; they may be either trusts lawful or trusts unlawful.

The division of trusts, however, which is generally made for the purposes of a treatise on equity, is one based upon the manner in which trusts are created, and it is plain that this may be in one of two ways—either, first, by act of party, or second, by act of law. Trusts, as respects their mode of creation, are therefore divisible into express and implied trusts; and implied trusts are in this treatise again subdivided into resulting trusts and constructive trusts.

Express trusts, as a general rule, may be created by parol; and no particular form of language is necessary, but any words which sufficiently indicate intention will be competent to create a trust. Trusts in respect to real estate are, however, required by the statute of frauds in England to be in writing; and similar statutes have been passed in nearly all of the United

¹ Lewin, 21.

² Lewin, 144.

States. Express trusts may be created either by direct fiduciary expressions, or by precatory words, or by words indicating that a power is to be used in trust.

Of trusts by direct fiduciary expressions nothing need, at present, be said in explanation.

Trusts by precatory words arise where a testator has not used words of direct command, but expressions of entreaty or recommendation, which are construed, for the purpose of effectuating intention, to be equivalent to imperative words.

Powers in trust are those powers the exercise of which is not left to the discretion of the donee of the power, but are considered as obligatory because they are to be exercised for the benefit of some third persons, and the duty of the donee of the power is therefore looked upon as a trust.

A resulting trust may arise in several ways, one of the most usual being where a purchase is made and the money paid by one man, and the title to the property is taken in the name of another. Here the law implies a trust, on the part of the latter, to hold the legal title for the benefit of the actual purchaser. So too where there is a gift by will to trustees for a particular purpose which fails, a trust results for the benefit of the heir at law or next of kin, according as the gift is of real or personal estate.

A constructive trust may arise either out of fraud or in the absence of fraud. The most numerous cases of a constructive trust are those which spring from actual or presumptive fraud, and will be treated of under that head of equitable relief. A trust which arises from actual fraud is where (for example), a conveyance is obtained by direct deceit or misrepresentation. In such a case equity affords redress by treating the wrong-doer as a trustee of the legal title of the property, for the benefit of the injured party, and directing a conveyance.

Presumptive fraud is where the law supposes that a transaction is fraudulent from the mere circumstance of the relations of the parties or the nature of the transaction, without any proof of actual deceit. Thus a bargain between a solicitor and client, a guardian and ward, a parent and child, a trustee and *cestui qui trust*, or any other two persons standing in a confidential or *quasi* confidential relation, touching the subject matter as

to which the fiduciary relation exists, will be set aside at the option of the client, ward, child, or *cestui qui trust*, as the case may be, unless the entire fairness of the transaction is abundantly proved. In this case, also, equity uses the theory of a trust for the purpose of effecting relief, in the same way as in cases of actual fraud.

A constructive trust, in the absence of fraud, may arise in several ways: thus where a person acquires trust property without notice of the trust, but without having paid any value for it, he is not entitled to hold it discharged of the trust, but is looked upon in equity in the same light as a trustee, and is compelled to convey or otherwise dispose of the property accordingly. Another common instance of constructive trusts occurs in the renewal of leases; the rule being that if a trustee or executor, or even an executor *de son tort*, renew a lease in his own name, he will be deemed, in equity, a trustee for those interested in the original term.¹

Another instance of a constructive trust in the absence of fraud is where a binding contract is made for the sale of real estate. In such a case, before the conveyance is executed, equity treats the vendor as a trustee of the land for the benefit of the vendee, and the latter as a trustee of the purchase-money for the benefit of the former. This doctrine more properly falls under the subject of specific performance, and will be treated of under that head.

Having noticed the manner in which trusts are called into being, the next thing to be considered is "for what purposes are trusts usually created?" One of the most frequent and important of these purposes is to secure the property of married women; and this is effected by a gift to her sole and separate use. The separate use is a creature of equity; and is, perhaps, one of the best illustrations which could be given of the manner in which courts of equity in certain cases depart from the rules of common law. By the latter, a husband was entitled to all his wife's personalty in possession; to her *choses in action*, if he chose to reduce them into possession, or (as the rule is sometimes held) convert them to his use; and to a life estate in her realty.

¹ Lewin, 217.

Equity, for the benefit of married women, allows gifts to be made to her by which her husband may be deprived of all these rights.

By conveying the estate to a trustee for the sole and separate use of a married woman, the *corpus* of the estate may be secured from any control of the husband, or from any liability to his debts; and the income paid directly to the wife. In England, and in some of the States of the Union, the wife has the same control over the separate estate (unless expressly restrained), as she would have if unmarried. In other States, she has only those powers which are conferred upon her by the instrument creating the estate.

The descent and distribution of separate use estates is the same as that of legal estates, except (of course) where differences are made by statute; and this rule indeed applies to all equitable estates, except that a woman is not dowable out of an equitable estate, although a man is entitled to his tenancy by the curtesy.

Connected with the subject of a married woman's equitable separate estate, is what is known as her equity to a settlement. This arises when a husband is obliged to go into a court of chancery for the purpose of reducing his wife's choses in action to possession; or getting in any property that belongs to her. In such a case, the court refuses to aid the husband, except upon the terms of making a reasonable settlement upon the wife out of the property.

Gifts directly from the husband to the wife will also require notice under this head—as these gifts are void at law, and are upheld by virtue of equitable doctrines only.

Another important class of trusts are those for charitable purposes. These trusts are of a public nature, and differ from other trusts in at least one important particular, viz., in not requiring such a degree of certainty in the description of the beneficiaries as is requisite in an ordinary private trust. They depend very much in England, and in many of the United States, upon a statute passed in the reign of Queen Elizabeth, and constitute an important branch of equitable jurisdiction.

A court of chancery always exercises a supervision and control over trustees in the administration of their trusts. Any trustee is entitled to come into court for advice or assistance;

and any *cestui qui trust* may invoke the interposition of the chancellor in case of breach or abuse of the trust.

The duties of trustees of course vary with the character of the trust and the nature of the subject matter thereof. They may be said to be summed up in the duty faithfully to attend to the interests of the *cestui qui trust*, and to abstain from making any use of the trust property for the trustee's own benefit.

Trustees, according to the English rule, are not entitled to compensation; but in this country the law is generally otherwise.

21. The case of Mortgages is the next head of jurisdiction in which an independent title is created and recognized in equity. A mortgage is a conveyance of real estate to secure a debt due by the mortgagor (the party who executes the conveyance) to the mortgagee (the party to whom the conveyance is made); coupled with a clause of defeasance by which, upon the payment of the debt on a day specified, the title to the property reverts in the mortgagor. At law, if the day for payment passed by, the estate became absolute in the mortgagee, and the mortgagor's title was wholly gone. Equity, however, stepped in to his relief, and recognized a title still existing in the mortgagor, whereby he has a right to redeem the mortgaged property on any subsequent day, by paying the debt with interest. This is called the mortgagor's "equity of redemption;" a right which is now inseparably connected with every mortgage.

On the other hand, equity gives a remedy, unknown to the common law, by allowing the mortgagee to *foreclose* (as it is called) this equity of redemption. In a foreclosure suit a decree is entered whereby another day is fixed for redemption; and if the mortgagor does not take advantage of the new opportunity thus afforded him, his right is forever gone.

22. The last equitable title is that which grows out of the assignment of *choses in action*, which could not be transferred at law, but assignments of which are upheld in equity when they are made for a valuable consideration, and do not contravene any rule of public policy. In this case, as in that of trusts, equity creates a new title, co-existent with the legal title, and which (as has been already explained) will be enforced either by compelling the assignor to allow the assignee to use his name in an

action at law, or by affording direct relief by bill in equity when any difficulty in bringing the legal action exists.

23. Besides creating new titles, independent of legal ownership, equity also affords relief by setting up and enforcing equitable rights in regard to existing legal titles. This is done by virtue of certain doctrines by which common law rights of enjoyment are modified or controlled. The first of these equities which will be noticed, are those of Accident and Mistake.

The relief afforded in the case of Accident springs from the ancient jurisdiction of the court of chancery in what were known as "cases of extremity." It is now exercised principally in three cases: first, in the case of lost instruments; secondly, in the case of defective execution of powers; and thirdly, in the case of penalties and forfeitures. The jurisdiction of equity in cases of Mistake grew out of the great credit which common law courts gave to a sealed instrument, and to the inability of these courts to afford an adequate redress in all cases of mistake.

Mistakes are of two kinds, mistakes of law and mistakes of fact. As a general rule, mistakes of law cannot be relieved against even in equity; but for mistakes of fact relief may be had upon a proper case being shown. Such relief is often administered in the case of powers defectively executed through mistake.

24. The next equitable rights which will require notice are those which grow out of Fraud.

Fraud, indeed, vitiates transactions at law as well as in equity; but the jurisdiction of chancery is superior to that at common law, for two reasons—first, because in equity fraud has a more extensive signification than at law; and secondly, because the relief afforded is much more complete.

It is, however, frequently difficult to say with precision what cases fall under the head of fraud as a distinct ground for relief in equity, because fraud so often exists in connection with other reasons for the assistance of a chancellor that it is hard to determine on what particular ground the relief is afforded. Thus, as we have seen, certain kinds of constructive trusts are based upon fraud; in other words, equity considers that, in consequence of certain fraudulent conduct, the relationship of trustee and *cestui qui trust* is called into being, and the rights of the

parties are determined upon the basis of that relation. The ground of relief, therefore, is both fraud and trust. So, also, certain equitable remedies are founded upon the idea of doing complete justice in cases of fraud. Thus, if a person has been fraudulently induced to sign a bond, equity will not compel the obligor to wait until an action at law is brought thereon, and then take defence, but will afford relief, not only complete, but also immediate, by directing the fraudulent instrument to be delivered up to be cancelled. It will be seen, therefore, that this subject of fraud not only furnishes ground for relief at law, but also runs into at least two other distinct heads of equity.

There are, however, certain classes of cases in which fraud alone gives jurisdiction, and it has, therefore, been ordinarily considered as one of the special heads of the jurisdiction of a court of chancery, and will accordingly be so treated in this work.

Another and very important reason for so treating it, is the fact that in many States of the Union it is made one of the cases in which equity powers are granted to the courts. In those States, therefore, where these powers are not general, but limited, it is necessarily of no little consequence to determine exactly what is meant by the language of the statute, and therefore to know what is the nature and what the bounds of chancery jurisdiction on this subject.

Fraud has been divided, according to the classification of Lord Hardwicke in *Chesterfield v. Jansen*,¹ for the purpose of convenient consideration, into four classes, viz.: 1. Fraud arising from facts and circumstances of imposition; 2. Fraud arising from the intrinsic matter of the bargain itself; 3. Fraud presumed from the circumstances and condition of the parties contracting; 4. Fraud affecting third persons not parties to the transaction. This classification has been adopted in the present treatise.

25. Growing out of the general subject of fraud is that of Notice, which embraces also the subordinate equities of *bona fide* purchasers, and the application of purchase-money. Notice is a doctrine which is recognized for the purpose of protecting equitable titles. At common law the purchaser of a legal title acquired the absolute property in the subject. In equity, however,

¹ 1 Atk. 301; 2 Ves. 125; 1 Lead. Cas. Eq. 428.

if he has notice of an equitable title, he will be considered as a trustee of the legal title for the benefit of the equitable owner. On the other hand, want of notice may be a protection to a purchaser against the assertion of an equitable right. In such a case he sets up the plea of being a *bonâ fide* purchaser for a valuable consideration without notice; and is thereupon entitled to the favorable consideration of a court of chancery.

Another equity springs also from the general head of Fraud, but requires a separate consideration, that, namely, of Estoppel. Estoppel is the agency of the law by which evidence to controvert the truth of certain indisputable admissions is excluded.¹ Estoppels, in general, may arise either by matter of record, of deed, or *in pais*. Equitable estoppels fall under the last class, and they grow out of representations which, after they are made, cannot be denied, but must be adhered to by the party making them. The representation which will operate as an estoppel must be one that is either a suggestion of falsehood, or a concealment of truth when there is a duty to speak; it is always external to the transaction; and it may take place either in a transaction effected between the party alleging the estoppel and the party estopped, or in one between the party alleging the estoppel and some third party.

Somewhat akin to the doctrine of estoppel, and therefore properly to be considered in immediate juxtaposition, is the doctrine of Election, whereby a party is compelled to choose between inconsistent benefits, and is precluded (after having once exercised his choice) from insisting upon rights which he would otherwise be perfectly free to assert. Thus, if a testator gives money or land to A., and, by the same will, gives something of A.'s to B., here A. must elect either to give effect to the will by allowing B. to have the property which the testator intended should go to him, or to assert his right to his own property, in which case he must make good its value (out of the gift to himself) to the disappointed beneficiary. An election may be either express or implied. In order that the doctrine may be called into play it is necessary that the testator should affect to dispose of property which is not his own, and should also make a valid gift of his

¹ Bigelow on Estoppel.

own property ; and it is further requisite that the twofold gift should be made by the same instrument. In order to make a valid election the party electing must have adequate information in regard to the values of the two pieces of property between which he is to choose ; and he is entitled to the assistance of the court for the purpose of determining the values. As a general rule, an election can be made only by persons *sui juris* ; but a court of equity will sometimes elect for the benefit of a *feme covert* or an infant.

26. The next equity which will be considered is that of Conversion, by which is meant a change of property from real into personal, or from personal into real, not actually taking place, but presumed to exist only by construction or intendment of equity. This result may take place under a will, or by an instrument *inter vivos*. A devise of land to trustees, with imperative directions to sell and divide the proceeds between certain persons, would be an illustration of a conversion under a will ; a binding contract for the sale of realty would be an example of the application of the same doctrine to a transaction *inter vivos*. In both cases the land would, in the eye of equity, be considered, for certain purposes of devolution, turned into money from the date of the death of the testator in the one case, and from the date of the contract in the other ; and in the event of the death of the beneficiary or the vendor, would be distributable as personality to the next of kin, and would not descend to the heir as real estate.

To effect a conversion by will it is generally necessary that the words be imperative ; and by contract, that its terms should be binding. Certain exceptions, however, to these general rules may occasionally occur.

The purposes for which a conversion is designed sometimes wholly or partially fail, and interesting questions then arise as to the effect of this failure upon the subsequent devolution of the estate. When the failure is total the rule is very simple, as no conversion then takes place. In cases, however, of partial failure, the rules are more difficult of application, and cannot be condensed in a brief synopsis.

The parties interested in an estate directed to be converted may, if they all concur, elect to take it in its present and not in its

changed state. By such an election there is effected what is called a re-conversion, by which the property is considered as retained in its actual condition, and is transferable and descendible accordingly.

27. The next class of equitable rights which will require consideration embraces those which may be comprehended under the general head of Adjustment, and which includes the subordinate heads of Set-off, Contribution, Exoneration, Subrogation, and Marshalling. These equities are called into play for the purpose of securing the orderly and equitable adjustment of liabilities against the parties by whom, and in favor of those to whom they are justly due; and they all depend upon the general equitable principle that burdens ought to be thrown upon those who should justly bear them, but only in their due proportion and in their proper order, and that benefits should be secured to those who are of right entitled thereto, with a just regard to the rights of others.

The right of set-off, although it is a right of equitable origin, has, nevertheless, been so effectually introduced by statute both in England and in this country, that the occasions for its application by courts of chancery are exceedingly rare. Mere matters of set-off will not give the court jurisdiction, for such rights can be effectually tried at law; but where there is anything peculiar in the case, so as to render it impossible for exact justice to be done by a court of law under the statutes, a court of chancery will afford relief through the medium of an equitable set-off.

The equity of contribution arises when one of several parties, who are liable to a common debt or obligation, discharges the same for the benefit of all. In such a case he has a right to call upon his co-debtor for contribution. This right is most frequently exercised in the case of sureties; as is also the equity of exoneration, which is a right of a person secondarily liable to call upon the party primarily liable, to discharge the debt, or to reimburse him if he has paid it.

The case of suretyship, however, is but an illustration of both of these rights; and the same equities are applicable to other relations out of which joint or successive liabilities have sprung.

The right of subrogation is an auxiliary equity, called into

existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of any securities which the creditor may hold against the principal debtor, and by the use of which the party paying may thus be made whole. Thus a surety who pays a debt which has been reduced to judgment is entitled to have the judgment kept alive for his benefit, and to enjoy, as against the principal debtor, the advantages which could have been claimed by the judgment creditor.

None of these equities are founded upon contract, but upon general principles of equity, and being all rights of a purely equitable nature, they are subject to the general qualification by which the exercise of all such rights is controlled, viz., that they must not be asserted in such a way, or under such circumstances, as to do violence to the rights and equities of other parties.

The doctrine of marshalling grows out of the principle that a party having two funds to satisfy his demand shall not, by his election, disappoint a party who has only one fund. Thus a person who has a mortgage on two parcels of land, ought not, in fairness, to resort in the first instance to one of them, upon which there also happens to be a junior mortgage which is not otherwise secured; for in so doing the junior mortgagee might be altogether cut out. Equity, however, is loath to interfere with the rights of a creditor to enforce payment out of any of his securities, and therefore the remedy usually afforded to the junior disappointed mortgagee is to substitute him to the rights of the paramount mortgagee as against the other property.

The doctrine of marshalling is applied in the administration of estates of debtors both during their lifetime and after their death; although in this country the necessity for its application to the estates of decedents has been very much lessened by the numerous legislative enactments whereby the distribution of the assets of a deceased debtor are regulated and controlled.

28. The last equitable rights which will be noticed are Liens.

A lien is a right at common law; but it is a right which is inseparable from the possession of the article on which the lien is claimed to exist.

In equity, however, a lien may exist wholly independently of possession, and under circumstances which would give the party

no common law right at all. There are several of these equitable liens, one of the most important of them being the vendor's lien upon real estate for unpaid purchase-money. This lien constitutes a charge upon the estate in the hands of the vendor, but it does not come into actual existence until a bill is filed to assert it. It is recognized in many of the United States; in others, however, it has never existed, or has been abolished or circumscribed by statute.

29. The next general division of chancery jurisdiction is that of Equitable Remedies; and the first, and one of the most important of these, is Specific Performance.

At common law the general rule was that all injuries were to be redressed by damages; and relief by a restoration of the injured party to the actual enjoyment of the thing or right of which he had been unjustly deprived, was never afforded except in the two cases of detinue and replevin. In equity, however, the rule is just the other way. A chancellor always aims at restoring the injured party to the exact position which he ought to have occupied if the wrong had never taken place. One of the means by which this object is attained is the equitable remedy by specific performance, which is, perhaps, most frequently used for the purpose of enforcing contracts for the sale of real estate, although it may be and is applied to other cases in which the common law remedy is insufficient, by reason of the inadequacy of pecuniary damages, or from the impossibility of estimating them. This equitable remedy, however, is not applied except under certain restrictions and within certain limits.

Thus it is a fundamental principle that specific performance will not be decreed unless the contract sought to be enforced is based on a valuable consideration, for the obvious reason that as the inadequacy of damages is the ground for equitable interference, there can be no such inadequacy where there is no damage sustained, as is the case with a mere volunteer.

Again, the complainant must show either that no damages could be recovered at law, or that the damages which might be recovered would fall short of affording complete redress. The reason for this rule is the obvious one that if money would operate as a full measure of redress, there is no ground whatever for the interference of a chancellor, as the complainant can get

all he wants at law. It must, moreover, be observed that the jurisdiction to decree specific performance is always exercised subject to general equitable considerations; and that therefore a court of equity will not aid a complainant if he has been guilty of laches and negligence, or if equitable considerations interpose upon the other side—such as that the contract is hard and oppressive, or that the condition of things has materially changed, or the like.

Equity will not enforce a contract within the statute of frauds (*e. g.*, an agreement to sell real estate), unless it is reduced to writing; but to this rule there are some exceptions. Thus parol contracts may be enforced where there has been a sufficient part performance of the contract, or where its reduction to writing has been prevented by fraud, or where the contract is admitted by the defendant's answer, and the statute is not set up as a defence.

Equity, also, in applying this equitable remedy, will sometimes call into play subordinate equities, by decreeing specific performance with compensation for defects, and by giving time to make out a title beyond the day fixed in the contract.

30. The equitable remedy by Injunction may be described as in a certain sense the complement of the remedy by specific performance; as in the latter case a party is compelled to do what it is his duty to do; whereas by injunction he is restrained from doing that which he ought not to do. Injunctions, however, are sometimes of a mandatory character, in which case they compel the performance of an act, and are, therefore, equivalent to a decree for specific performance. An injunction, in its legal sense, may consequently be defined to be a writ remedial issuing by order of a court of equity, and commanding a defendant to perform some act, or restraining a defendant from the commission or continuance of some act. The writ is, therefore, either mandatory or prohibitory. Injunctions are also either interlocutory, *i. e.*, made during the progress of the cause, or perpetual, *i. e.*, made upon final decree. They are either *ex parte* or after hearing; and were, formerly, either common or special; but the common injunction is now practically out of use, and all injunctions are special—*i. e.*, granted upon the merits as disclosed by affidavits or other proofs.

The purposes for which injunctions are issued are very numerous, and extend, in fact, over nearly the whole field of equitable jurisdiction. They may be divided into two general divisions, namely, first those cases in which the writ issues for the purpose of protecting *equitable* rights; and, secondly, those in which the writ issues for the purpose of protecting *legal* rights.

Injunctions are used for the purpose of protecting equitable rights in two ways: in the first place, by enjoining proceedings in the common law courts, whereby and wherein such rights may be violated or disregarded; and, in the second place, by interposing for the protection of such equities, when injury thereto is threatened by other means than through legal proceedings.

Under the first of these heads it is well settled that equity will interfere to restrain proceedings at law, whenever, through fraud, mistake, accident, or want of discovery, one of the parties in a suit at law obtains or is likely to obtain an unfair advantage over the other, so as to make the legal proceedings an instrument of injustice.

It is difficult, perhaps, to mark out with precision the exact limits within which a court of equity will interfere with proceedings at law; but it may be stated generally that such an injunction will be granted whenever, in the common law action, an equitable title is not recognized, or an equitable right not enforced, or where exact and complete justice would not be done between the parties by reason of the want of an equitable remedy.

A court of equity moreover frequently interferes by injunction for the purpose of preventing unnecessary or vexatious litigation; and this it does in many ways, viz., by compelling a party to elect between two remedies; by restraining a party from bringing an action in another court after a court of equity has once obtained possession of a cause; by putting a stop to repeated attempts to litigate the same question; and by interfering to protect a party who is liable to discharge some debt, duty, or obligation from vexatious suits by two or more parties severally claiming to be entitled to the benefit of such debt, duty, or obligation. Bills to restrain repeated attempts to litigate the same question are termed bills of peace, and are of two kinds, being filed either (first) to prevent the vexatious occurrence of litigation by a nume-

rous class insisting upon the same right, or (second) to prevent the same individual from reiterating an unsuccessful claim. Bills to protect parties who are liable to several claimants in respect of the same debt, duty, or obligation, are called bills of interpleader, and are based upon the ground that a mere stakeholder, who claims no interest, ought not to be troubled by the actions of conflicting parties who do claim an interest. Such a bill, therefore, must show title in two claimants, and it must *not* show any interest in the subject-matter on the part of the party filing it.

Of the second general class of cases in which equity interferes by injunction for the purpose of protecting equitable rights, bills to restrain a trustee from committing breaches of trust, to restrain a partner from a violation of his duty as partner, or to restrain the disclosure of confidential communications or of trade secrets, may be taken as illustrations. In such cases equitable titles and rights, and not those of common law, are infringed; and hence injunctions for the purpose of protecting them fall properly under the first of the two grand classes into which these writs have been divided.

The second of these general classes is that which embraces those cases in which the injunction issues for the purpose of protecting *legal* rights. The occasions which most usually call for the interference of equity for this purpose are cases of waste, trespass, nuisance, patent-right, copyright, literary property, trade-marks, alienation of property pending litigation, transfer of negotiable instruments, protection of property pending litigation, breach of negative covenants, and corporations.

31. Akin to the equitable remedies of specific performance and injunction, are those of re-execution, reformation, rescission, and cancellation. All these remedies together embrace, as it were, the complete circle of equitable relief in the case of contracts and duties. Thus a party may be held to a literal compliance with his contract by a decree for its specific performance; or he may be restrained from a violation of the contract by a writ of injunction; or, finally, if the written paper, which is the evidence of the contract, be lost, a re-execution may be ordered; if the contract has been erroneously expressed, a reformation may be decreed; and if, on the other hand, it has been obtained through fraud, it may be rescinded, and the documentary evidence

may be directed to be delivered up and cancelled. Re-execution, reformation, and cancellation are the means whereby the equities of accident, mistake, and fraud are ordinarily worked out. Thus where instruments are lost through accident, the equitable remedy which is applied is re-execution; where an instrument has been erroneously framed through mutual mistake, so that it does not express the intention of the parties, and the mistake is clearly proved, the redress which is afforded is reformation; while, where a contract has been entered into in ignorance or mistake, or is tainted with fraud, the relief which a chancellor affords is rescission and cancellation.

32. The next equitable remedies which demand consideration, are bills for account, for dower, for partition, in cases of confusion of boundaries, and for the ascertainment of rent. Bills for account arose from the inadequacy of the remedies at common law, those remedies being exceedingly limited in their scope, and cumbersome in their operation. In the equitable method of procedure, ground is first laid by obtaining discovery (when necessary) from the defendant, and the cause is then referred to a master before whom the account is taken.

Bills for partition and dower also had their origin in the inadequacy of the common law remedies. The superiority of the chancery practice in these cases is due to the fact that discovery may in this way be had, that masters and commissioners may be appointed to examine and report upon the rights of the parties, and that the decree may be moulded so as to embrace and adjust the rights of all parties in the subject-matter of dispute.

The equitable remedy for the ascertainment of boundaries is used when boundaries have become confused through the misconduct of the defendant, or of those under whom he claims; and a bill for the payment of rent will only lie in extraordinary cases, as where the days of payment are uncertain, or the remedy by distress has been lost without any fault of the owner of the land.

33. The equitable remedy of partnership bills is chiefly based upon the necessity for some kind of procedure, by which partnership affairs can be wound up and partnership assets administered; a procedure which it is manifest is not afforded by any of the forms of action at common law. Other relief is

also incidentally afforded in equity. Thus accounts are taken, assets are got in and protected, breaches of partnership duty are enjoined, and sales of partnership effects are ordered. A great many desirable results are therefore accomplished in one suit; and justice is administered not only between the partners, but also between the two sets of creditors, which almost invariably exist in such cases, viz., the creditors of the firm and those of individual partners. In settling the conflicting claims of these two classes of creditors, certain equitable doctrines are applied by the courts, which are based mainly upon the general proposition that it is the equity of each partner that firm assets are, in the first place, to be taken to pay firm debts, and that the equities of the creditors are to be worked out through this equity of the partners. These doctrines might, with some propriety, be noticed under the general equity of adjustment; but their intimate connection with the subject of partnership bills would seem to render their consideration under that equitable remedy still more appropriate.

The equitable remedy by creditors' bills is one which has been made use of very frequently in the United States. They are used for the purpose of getting at property of a debtor which cannot be reached at law; either because it has been conveyed away beyond the grasp of an execution, or because it is of such a character that it cannot be seized under a common law writ. Creditors' bills may be filed during the lifetime of the debtor or after his death. In the latter case, they generally result in administration suits, as the executor does not usually admit assets; and, therefore, the decree is not simply for the payment of the creditor by whom the bill has been filed, but for a general administration of the debtor's estate. Legatees may also come into chancery for the ascertainment of assets, and the administration of the estate.

34. The jurisdiction of the High Court of Chancery in England over the estates of infants results from a prerogative of the crown as *parens patriæ*. In the United States, this jurisdiction is not of as much importance as in England, as the persons and estates of minors are generally under the supervision of Orphans' Courts, Surrogate's Courts, or Courts of Probate, whose powers are regulated by statute. Still, in those States where courts of

chancery with general equity powers exist, the jurisdiction is still exercised; and in some States such jurisdiction is expressly conferred by statute upon the equity courts. The principal incidents to this jurisdiction are that the ward must be educated under the court's superintendence, that his estate must be managed and applied under the like superintendence, and that his marriage must be with the sanction of the court.

The jurisdiction of the English Court of Chancery in the case of lunatics and idiots is peculiar in this respect, viz., that it is not exercised in a regular suit, but by the chancellor personally, on petition, and the appeal, if his order be erroneous, is to the king in council, and not to the House of Lords.

This jurisdiction is exercised for the purpose of ascertaining (in the first place) the fact of lunacy; and (secondly) for the support of the lunatic and the management of his estate. The first end is attained by the issuing of a commission in the nature of a writ *de lunatico inquirendo*, under which the question of lunacy is passed upon by a jury; and the second purpose is accomplished by the appointment of a committee to take charge of the person and estate of the lunatic.

The care of the persons and estates of lunatics and idiots is governed in many States by statutes; in some States, however, courts of chancery exercise jurisdiction over this subject.

35. A bill for discovery is one whereby the power of the court is invoked for the purpose of compelling the defendant to discover and set forth upon oath every fact and circumstance within his knowledge, information, and belief, material to the plaintiff's case. It is an equitable remedy of great antiquity, and was formerly of very great importance, as no power to elicit testimony from a party to a cause existed at common law. At the present day, however, the necessity for the exercise of this equitable remedy has become much less frequent than formerly, as in the federal courts, in those of most of the United States, and of England, parties are now competent and compellable to testify.

The general right to discovery is fenced about by certain prohibitions and restrictions whereby the power of the court is prevented from being abused. Thus, in the first place, no person need discover matters tending to criminate himself or to expose

him to penalty or forfeiture; in the second place, no one is compellable to discover confidential communications which have passed between him and his legal adviser; and, lastly, persons occupying official positions cannot be compelled to disclose matters of State, the publication of which would be prejudicial to the community.

Subject to these restrictions every competent defendant in equity must answer as to all facts material to the plaintiff's case; he must answer to all, and not to a portion only; and he must answer distinctly, completely, and without needless prolixity, and to the best of his information and belief.

A court of equity will not only compel a defendant to answer under oath, but it will also, where it is necessary, oblige him to produce books and documents which are in his possession or control, which are material to the complainant's case, and which do not fall within any of the protecting rules mentioned above. In the United States this power is largely exercised by common law courts under statutory provisions.

Courts of equity also have jurisdiction to issue commissions to examine witnesses abroad; to entertain bills for the perpetuation of testimony when a right cannot be immediately determined, and to order examinations *de bene esse* to be used in their own proceedings or in those of other courts.

36. The last equitable remedies which require notice are bills *quia timet*, the appointment of receivers, writs of *ne exeat*, and writs of *supplicavit*.

Bills *quia timet* are analogous to the *brevia anticipantia* (writs of prevention) at common law. Their object is to prevent anticipated mischief, or to protect a party from vexatious litigation which is likely to occur. Thus, where a man covenants to save another harmless in respect to certain payments which are to be made from time to time, a bill may be filed before any breach for the purpose of obtaining a decree that the defendant shall specifically perform his covenant, and a reference to a master will be directed to report from time to time any breach that may happen, so that action of the court may be at once taken thereon. So also bills may be filed for the purpose of compelling a party who has a *prima facie* right, to assert it within a reasonable time. Sometimes also bills which are filed for the purpose of removing a cloud from a title, may fall under the same class.

Another instance of the preventive remedies of the Court of Chancery is that of the appointment of receivers. These appointments are made for the purpose of preserving property, and of preventing threatened or anticipated injury thereto. A receiver is an indifferent person between the parties appointed by the court to collect and receive the rents, issues, and profits of land, or the produce of personal estate, or other things in question pending the suit, which it does not seem reasonable to the court that either party should do, or where a party is incompetent to do so, as in the case of an infant. The objects sought by such appointment are, in general, to provide for the safety of property pending the litigation which is to decide the right of litigant parties, or during the minority of infants, or to preserve property in danger of being dissipated or destroyed by those to whom it is by law entrusted, or by persons having immediate, but partial interests therein. This equitable remedy is manifestly founded on the want of any such remedy at common law.

A writ of *ne exeat* is a writ to restrain a person from leaving the jurisdiction; and was originally used for purposes of state only, but is now extended to private transactions. It operates in the nature of equitable bail. It is mostly used where a suit is commenced in chancery against a man, and he, designing to defeat the other of his just demand, or to avoid the justice and equity of the court, is about to go beyond the sea, so that the duty will be endangered if he goes. This writ was originally a high prerogative writ, but it has now become an ordinary process of courts of equity, and has been extensively used on both sides of the Atlantic.

A writ of *supplicavit* is a writ granted upon the complaint of a suitor of the court that he is abused and stands in danger of his life, or is threatened with death by another suitor, who is thereupon taken into custody, and must give bail (if the case is made out against him) for good behavior. It will be observed that this writ is in the nature of process to find sureties of the peace; and as this end is ordinarily and completely attained by other means, the writ of *supplicavit* has fallen into almost total disuse.

CHAPTER III.

MAXIMS IN EQUITY.

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| 37. No right without a remedy. | 43. He who seeks Equity must do Equity. |
| 38. Equity follows the Law. | 44. Equity looks upon that as done which ought to be done. |
| 39. <i>Vigilantibus non dormientibus Æquitas subvenit.</i> | 45. Between equal equities priority of time will prevail. |
| 40. Between equal equities the law will prevail. | 46. Equity imputes an intention to fulfil an obligation. |
| 41. Equality is Equity. | 47. Equity acts <i>in personam</i> . |
| 42. He who comes into Equity must do so with clean hands. | 48. Equity acts specifically. |

37. A MAXIM is the embodiment of a general truth or principle expressed in the shape of a familiar adage. There are in equity several of these maxims in which the general principles of chancery jurisdiction, and the methods by which they are applied, are succinctly expressed.

I. The first of these maxims is that equity will not suffer a right to be without a remedy. The principle expressed by this maxim is, indeed, the foundation of equitable jurisdiction, because, as we have seen, that jurisdiction had its rise in the inability of the common law courts to meet the requirements of justice.

Whenever, therefore, an infringement of legal rights of a civil, as distinguished from a criminal, nature exists, for which there is no other remedy, a court of chancery will be ready to afford one.

Two qualifications are to be attached to this maxim. In the first place the right must be one of which municipal law can take cognizance, and not one which falls merely within the scope of moral law. There are many matters in which a man is answerable in *foro conscientiae* alone, and with these equity cannot interfere. Thus, while the jurisdiction of courts of equity in questions of fraud is very broad, it nevertheless does not pretend to set

aside a transaction simply because it is dishonorable, or is opposed to that delicate sense of right which every conscientious man ought to have. In other words, equity does not pretend to enforce all the principles of sound morals.

In the second place, equity will not afford relief where there has always been a full, adequate, and complete remedy at law. In such a case there is no ground for the interference of equity. But if a court of equity has originally assumed jurisdiction over a particular class of cases, it will not, as a general rule, be ousted from that jurisdiction simply because, in the progress of common law improvement, redress comes to be subsequently obtainable at law.

When the jurisdiction of courts of chancery depends upon precise statutory regulations, the operations of this maxim are, of course, controlled by the language of the particular legislative provision by which it is regulated.¹ And so where a case, formerly cognizable in chancery alone, is, by statute, brought within the scope of common law jurisdiction, the equitable jurisdiction may sometimes be ousted. Thus it has been decided in South Carolina that the power conferred by statute of calling the opposite party as a witness in common law actions, has taken away the jurisdiction by bills for discovery in chancery.² But under the English statute a different rule prevails.³

38. II. The second maxim which will be noticed is that equity follows the law. The meaning of this maxim is that equity applies to equitable titles and interests those rules of law by which legal titles and interests are regulated, provided this can be done in a manner not inconsistent with the equitable titles and interests themselves. Thus equitable estates are subject to the same laws of inheritance as legal estates, and their devolution is the same. And so, as at common law the husband was entitled absolutely to his wife's chattels in possession, he is in like manner considered entitled to chattels of which she is the equitable

¹ See the cases of *Boyce v. Grundy*, 8 Hampshire, Massachusetts, Connecticut, Peters, 215; *Oelrichs v. Spain*, 15 Wallace, 228; *Grand Chute v. Winegar*, *Id.* 375; *Woodman v. Freeman*, 25 Maine, 581; and *Clarke v. Robinson*, 58 *Id.* 137; and the statutory provisions in the United States, and in Delaware, Alabama, New
and Oregon, as set forth, *ante*, p. 18, note.

² *Hall v. Joiner*, 1 S. C. 186.

³ *Smith's Outline of Equity*, 483. So also in New Jersey; *Shotwell v. Smith*, 5 C. E. Green, 70.

owner. But where the property is settled to the separate use of a *feme covert*, equity will not suffer the title of the husband to be asserted, for to do so would be to defeat the title which has been created in equity for the benefit of the wife. In the case of executory trusts, also, equity will sometimes refuse to apply the strict rules by which legal estates are controlled; but this is because such trusts are in an inchoate condition, and the exact quality and duration of the estate is not, in them, strictly defined.

Equity also may be said to follow the law when rights in equity are considered barred by lapse of time in analogy to the statutes of limitations.

39. III. Another maxim is *vigilantibus non dormientibus æquitas subvenit*, the meaning of which is sufficiently obvious. It is designed to provoke diligence, to punish laches, and to discourage the assertion of stale claims. By virtue of this maxim such claims are rejected in equity, independently of any statute of limitations.¹ In many cases equitable relief depends upon the discretion of the chancellor, and the laches of the complainant is often one of the most important of the elements which are taken into consideration when that discretion is exercised.

40. IV. Between equal equities the law will prevail. If two persons have each an equally good equitable right, but one of them has the legal title to the subject of the dispute, equity will not interfere, but leave them to the courts of law, when, of course, the holder of the legal title will prevail. Thus if a purchaser for a valuable consideration, without notice of a prior equitable right, obtains the legal estate at the time of his purchase, he will be entitled to priority in equity as well as at law.²

41. V. Another equitable maxim is that equality is equity. This may be illustrated by the manner in which the court acts in the case of a power in trust, where the donee of the power who has the option of selecting out of a class has failed to exercise his discretion.³ In such a case, if there is more than one intended beneficiary, equity will divide the property equally among all.

42. VI. He who comes into equity must do so with clean

¹ Smith's Eq. 19. Hill on Trustees, 169, note.

² Note to Basset v Nosworthy, 2 Lead. Cas. Eq. 5.

³ See *post*, Part I., Chap. II.

hands. Thus a party who seeks to set aside a transaction on the ground of fraud, must, himself, be free from any participation in the fraud, if he desires relief in equity. Of course this only applies to the particular transaction under consideration, for the court will not go outside of the case for the purpose of examining the conduct of the complainant in other matters, or questioning his general character for fair dealing.

43. VII. He who seeks equity must do equity. The usual illustration of this maxim is the case of a borrower of money on usurious interest, who comes into a court of equity to ask for relief by having the transaction set aside. Equity will not afford him redress except upon the terms of his returning the amount actually borrowed with lawful interest, because it is as equitable that the person who has loaned the money should have the amount with lawful interest returned to him, as that the borrower should be relieved from his unjust obligation to pay a usurious rate. Another, and a striking illustration of this maxim, is found in the rule that when a husband comes into chancery for the purpose of getting in his wife's equitable property, he will not be assisted except upon the terms of making a reasonable settlement upon his wife.

44. VIII. Equity looks upon that as done which ought to be done. This is a very important maxim, and one which lies at the foundation of many of the great doctrines in equity. For the purpose of reaching exact justice, equity will frequently consider that property has assumed certain forms with which it ought, in justice, to be stamped, or that parties have performed certain duties which they ought, in justice, to fulfil; and will regulate the enjoyment and transmission of estates and interests accordingly. Thus, where a testator has imperatively directed land to be sold and turned into money, equity will consider that the *conversion* (as it is termed) has taken place from the instant of the testator's death, and the subsequent devolution of the property will be governed by the rules which control, not real, but personal estate. And so, as it is the duty of a trustee to deal with the trust property for the benefit of the *cestui qui trust*, a profit made in his own name will be regarded as made for the benefit of the trust estate. This maxim will be found running through the whole system of equity jurisprudence.

45. IX. The next maxim is that between equal equities priority of time will prevail. This is the rule which is applied to determine the order between conflicting equities. If nothing else intervenes to turn the scale, the man who is first in time will be first in right. The maxim is frequently applied in questions which arise under titles acquired through equitable assignments.

46. X. Equity imputes an intention to fulfil an obligation. What is meant by this maxim is that when a person covenants to do an act, and he does that which may either wholly or partially be converted to or towards a completion of the covenant, he shall be presumed to have done it with that intention. In the case of *Wilcocks v. Wilcocks*, which is a leading authority upon this point, a person covenanted to *purchase and to settle* lands of a certain value, and afterwards purchased lands of equal or greater value which descended upon his heir, and it was deemed a performance of the covenant.¹ Upon the same principle a purchase in the name of a child will be considered as an advancement and not as a resulting trust for the benefit of the father (the purchaser);² and a legacy to a child will be treated as a provision.³

47. XI. Equity acts *in personam*. One of the ordinary means of enforcing obedience to the decrees of a court of equity is by an attachment against the person of the defendant. Hence, when the *parties* are within the jurisdiction of a court of chancery, it will not ordinarily hesitate to grant relief, although the property to be ultimately affected by the decree may lie in another forum. Thus the court of chancery in England decreed specific performance of a contract respecting the boundaries of Pennsylvania and Maryland, when colonies, entered into by the proprietaries.⁴ But where, in order to the relief sought, it is necessary to deal directly with the land itself, the foreign situation of the property will be a bar to the jurisdiction. Thus, a bill cannot be brought for a partition of land outside of the jurisdiction, for the court cannot issue a commission there.⁵

¹ *Wilcocks v. Wilcocks*, 2 Vern. 558; 2 Lead. Cas. Eq. 345.

² *Post*, Part I., chap. on Implied Trusts.

³ *Adams's Equity*, 102.

⁴ *Penn v. Lord Baltimore*, 1 Ves. 444;

⁵ 2 Lead. Cas. Eq. 767.

⁵ *Smith's Manual of Equity*, 30.

48. XII. The last maxim which will be noticed is that equity acts specifically, and not by way of compensation; which embodies a general principle running through the whole system of chancery jurisprudence. This principle is that equity aims at putting parties exactly in the position which they ought to occupy; giving them *in specie* what they are entitled to enjoy; and putting a stop, actually, to injuries which are being inflicted. Thus, equity decrees the performance of a contract, and does not give damages for its breach.¹ So, also, equity will, under certain circumstances, restrain the commission of destructive trespass;² whereas at common law all that the aggrieved party could obtain would be a money compensation for the injury. And so, again, a chancellor will sometimes compel a party specifically to make good his representations by which another has been misled; while in the common law action of deceit, damages alone can be recovered.

In some exceptional cases, indeed, equity will afford compensation in lieu of specific relief; but such cases are rare. These exceptions, as well as the general principle contained in this maxim, will be illustrated more at length under the appropriate heads of Specific Performance and Injunction.

¹ *Post*, Part III., chap. on Specific Performance.

² *Post*, Part III., chap. on Injunctions.

PART I.

EQUITABLE TITLES.

CHAPTER I.

TRUSTS ; THEIR ORIGIN, HISTORY, AND GENERAL NATURE.

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| 49. Definition of Trusts. | 57. Executed and Executory Trusts ;
<i>Glenorchy v. Bosville ; Sackville-
West v. Homesdale.</i> |
| 50. Distinction between Trusts and <i>Fidei
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49. A TRUST in its technical sense is the right, enforceable solely in equity, to the beneficial enjoyment of property of which the legal title is in another. The radical idea of a trust is this separate co-existence of the legal title with the beneficial ownership, or, as it came to be called, the equitable title. The perfect ownership is, as it were, decomposed into its constituent elements of legal title and beneficial interest, which are vested in different persons at the same time.¹ Thus to take the simplest case, if land is conveyed or devised to A. on such terms that he is compellable to hold it for the benefit of B., here A. has the legal title, B. has the beneficial ownership, or a right to enjoy the land ; and this right, originally enforceable solely in equity by suing out a subpoena against A., was considered as attaining the dignity of a title.

¹ See the argument in *McDonough's Exrs. v. Murdoch*, 15 Howard, 391.

The length of time during which this separation of the ownership into its constituent elements continues, and the extent of B.'s control over the property, in other words the *duration* and the *nature* of the trust, depend upon the terms by which it is created, subject, of course, to certain established legal rules.

50. It has been supposed that the English *trust* was identical with, or, at all events, bore a very great resemblance to, the Roman *fidei commissum*; but that there is a broad distinction between the two has been pointed out by high authority. In *McDonough's Executors v. Murdoch*¹ the question arose whether a "trust" was within the language of the Louisiana code prohibiting *substitutions* and *fidei commissa*, and it was held that it was not. The difference between the two was clearly explained in the opinion of the court in that case,² and indeed is obvious from a consideration of the nature of the *fidei commissa* as they existed under the Roman law.

The *fidei commissum* was the means of carrying out *substitutions* which could not be otherwise effected by the testator. By a *substitution* a party could be appointed to take the inheritance in case the person who was designated as heir in the first instance, did not make his election to accept the inheritance within a specified time, or in case he was a descendant of the testator, and after becoming heir died under puberty.³ Thus, the testator could say, "Lucius Titius, be heir and make thy election⁴ within the next hundred days after thou hast knowledge and ability. But if thou dost not so make election be disinherited, and then Mœvius be heir."⁵ And also, "Titius, my son, be my heir. If my son shall not become my heir, or if he become my heir and die before he comes into his new governance, Seius be heir."⁶ If, however, a stranger, and not a descendant, was instituted as heir, a substitution could not be made in such a way that if the heir died within a specified time some other person should be heir to him.⁷ But this end was effected by means of the *fidei commissum*,

¹ 15 Howard, 367.

² *Id.* 407-409.

³ Commentaries of Gaius (Abdy & Walker), Book II., §§ 174 to 180; and see *McDonough's Exrs. v. Murdoch*, 15 How. 407, 408.

⁴ Election, choice.

⁵ Com. of Gaius, *ut sup.*

⁶ *Id.* § 179.

⁷ *Id.* § 184.

whereby the heir was bound to deliver over the inheritance either in whole or in part, at or after a designated time.¹ In other words, the *fidei commissa* were the means whereby the transmission of estates, to be enjoyed by successive owners, was secured.² The performance of the *fidei commissa* was enforced at Rome by the consul or the prætor whose special jurisdiction was over *fidei commissa*, and in the provinces by the governor.³ Subsequently a prætor was appointed for the special purpose of hearing such causes, receiving, from the nature of his duty, the name of *prætor fidei commissarius*.⁴

It is true that in both the Roman *fidei commissa* and English trusts, a confidential relationship was presumed to exist;⁵ but in the former it was called into being for the purpose of transmitting the inheritance, in the latter in order to regulate the present enjoyment of the estate.⁶

The fundamental idea, moreover, which lay at the root of both trusts and *fidei commissa* was probably the same, viz., that under certain circumstances it might be convenient or desirable that one man should take and hold property, the benefit of which was sooner or later to accrue to another; but the development of this idea, in the two systems of jurisprudence, was essentially different.

The distinction, therefore, which it is desirable to remember as existing between the *fidei commissum* and the trust is this, that in the former there was no separation of the legal and equitable title, but there was simply a request, which afterwards became a duty imposed upon the *gravatus*, to convey the inheritance to another person, either immediately or after a certain event, *e.g.*, the death of the first taker; whereas, in the trust, the perfect ownership is decomposed into its constituent elements of legal title and beneficial interest, which are vested in different persons at the same time.

It may also be here remarked that the *fidei commissa* arose out of testamentary dispositions; whereas, English trusts were

¹ Com. of Gaius, §§ 184, 246 to 289.

⁵ Amos on the Science of Jurisprudence, 91.

² Resembling, in this particular, the system of estates tail in the English law.

³ Gaius, Book II., § 278.

⁶ A trust to convey an estate to another would bear a near resemblance to a *fidei commissum*.

⁴ Justinian, Lib. II., Tit. xxiii., §§ 1 and 2.

originally created only by conveyances *inter vivos*, land not being devisable before the statute of Henry VIII.

It may further be observed here that the *usus* and *usufructus* of the Roman law are not to be confounded with the English use or trust. The *usus* in the Roman law of property consisted in the right to the natural use of a thing, owned by another, by some definite individual, and the family circle of which he constituted the head, and was ordinarily not transferable. The *usufructus* was of greater extent than the *usus*, there being added to the latter the *fructus* or a right to enjoy the fruits of land to a greater extent than is necessary for daily consumption; and this right could be let, sold, or given to another.¹

51. When it was exactly that the idea of the separation of the complete ownership into the legal and equitable titles first made its appearance in England, it is, perhaps, impossible to say; nor can it be asserted with any certainty whether this idea was one of purely English growth, or whether it was imported from some other system of laws. The probabilities are in favor of its indigenous nature; for, as we have seen, it has no exact counterpart in the Roman law;² nor is it likely that the English lawyers of very early times had opportunities of studying this law, if any such ideas could indeed have been gathered from it.³

In early times, the idea of the separation of the legal and equitable titles must have met with an enemy in the feudal system. To allow a feud to be held by one person in trust for another, would have created confusion in determining to whom the lord was to look for the performance of the services annexed to the feud, and for these pecuniary and other advantages which he derived from the death of the feudatory, or the alienation of the estate. Hence Mr. Butler has regarded the introduction of

¹ See Justinian's Institutes, Lib. II., Tit. IV. and V. Tomkins and Jenkyn's Modern Roman Law, 173, 174.

² See the opinion of Judge Campbell in McDonough's Executors v. Murdoch, 15 Howard, 409.

³ The tendency in modern times is, perhaps, to exaggerate the extent to which the early English law is indebted to

the Roman law. Points of resemblance nearly always exist between all systems of jurisprudence; and, therefore, it should not be hastily inferred that the rules of one system were borrowed from another. The Roman law which influenced the English law was probably the early Roman law—not the law of Justinian.

uses as one of the most effective blows aimed at the feudal system.¹

Some attempts, indeed, have been made to show that trusts existed in the reign of King Alfred; but the better opinion seems to be that the instance referred to was the description of a tenure, and not the case of a trust.² The probabilities are, that trusts were recognized before the statute of *quia emptores* (13 Edw. I.), and became frequent after that date; this probability being founded on authority,³ and being further strengthened by the fact alluded to by Mr. Finlason that we not unfrequently fall into error when we assume that "because proceedings are not mentioned as being judicially decided upon, they did not exist."

Without, however, entering into any elaborate research, it may be safely assumed that in the reign of Edward III., the beneficial enjoyment of land as distinguished from the legal ownership was distinctly recognized;⁴ and it now becomes necessary to trace briefly the nature of this beneficial interest, its development into that permanent equitable estate known as a use, the nature of this estate prior to the famous statute of uses of 27 Henry VIII.; the effect of that statute, and the character of the equitable interests which it left untouched, and which together with certain other like interests, under the title of the modern trusts, fell peculiarly under the jurisdiction of the Court of Chancery.⁵

52. Before the statute of uses there appears to have existed a distinction between the technical "use" and a "trust." "When a trust," says Bacon,⁶ "is not special nor transitory, but general and permanent, there it is a use." The permanent "use" was the natural result and outgrowth of the "special trust." Two

¹ Co. Litt. 191, a, note, sec. VI. 11.

² Sanders, U. and T. 7.

³ See reference to Bro. Abr. tit. "Feoffment al Uses," in Reeve's Hist. Eng. L., vol. 2, p. 575, note (Finlason); and 1 Spence Eq. 439, note f; 447.

⁴ In the Statute 50 Edw. III. c. 6, the taking the profits by one where the estate

at law is in another is recognized; and in 7 Rich. II. c. 12, the word use (*oepe*) is first mentioned. Bacon, 28, 25; 1 Spence Eq. 440.

⁵ See Perry on Trusts, § 300.

⁶ Essay on Uses, 9. See also Hutchins v. Heywood, 50 N. Hamp. 497.

classes of beneficial interests consequently arose.¹ First, the use or simple trust, of which it is said "it is not like a rent out of the land, but is like a collateral thing annexed to the person touching the land; and it is but a confidence for the usage of land, that is to say, a confidence that the feoffees to whom the land has been given shall permit the feoffor and his heirs, and those whom they should designate to receive the profits of the land, and that the feoffees should make such estates of the land as they (the feoffors) should limit, and so their estate is but a confidence."² Second, the special trust: which was subdivided into the "special trust lawful," as if a man had enfeoffed another to the intent or in trust to be re-enfeoffed, or to the intent to be vouched, or to the intent to suffer a recovery; and the special trust unlawful, or covinous trust, as a trust to defraud creditors, or for maintenance, for defeating the tenancy to the præcipe, the statutes of mortmain, or the wardship of lords.

The courts of common law took no cognizance of these equitable interests, and the only remedy which the beneficiary enjoyed was by means of a subpoena out of chancery. Trusts of both descriptions had their origin either in fraud or fear. In fraud, for they were designed originally by ecclesiastics for the purpose of evading the statutes of mortmain, and were subsequently made use of in order to effectuate some covinous intent on the part of the feoffee, such as to defraud a lord of his wardship or creditors of their remedy for their debts; in fear, for the effectiveness of this method of defeating strictly legal rights, was soon readily taken advantage of during the disputes between the Houses of York and Lancaster, which began with Bolingbroke's usurpation in the reign of Richard II., in order to avoid the forfeiture with which the alternately successful parties visited the estates of their adversaries. Uses and special trusts, therefore, grew into a system, and they came to be governed by well-established principles. As beneficial interests rested solely upon the conscience of the feoffee, corporations were held not to be capable of a seizin to use, for they had no *souls*.³ The king or

¹ See Sanders, *Uses and Trusts*, 6; Lewin on *Trusts*, 2; 1 Spence Eq. 448.

² Delamere's Case, Plowden, 852 b.

³ Sanders, 57-87; Jenkins, 195.

queen could not be a feoffee to uses, for it was thought inconsistent with the royal dignity that such a confidence should be enforced against a sovereign at the suit of a subject. Hence, when the Duke of Gloucester, to whom many estates had been conveyed in trust, acquired the crown, a special statute was passed in order to remedy the mischief which would otherwise have arisen from the incapacity of enforcing trusts as against the king.¹

In addition to *confidence of person*, *privity of estate* was also necessary. No person could be seized to a use who was not *in* of the same estate as that of which the use had been declared. All persons who came in by title paramount, all persons who were *in* in the *post* and not in the *per*, took the estate free of the use. Such was the lord who was in by escheat, or a tenant by the curtesy. So also a disseisor, abator, or intruder.²

A consideration was necessary to raise a use where the conveyance was one which did not *operate by transmutation of possession*; and no use could be raised either of personal inheritances, such as annuities, or of things *quæ ipso usu consumuntur*, such as commons or ways in gross.

While the feoffee to uses was, in the eye of the law, the real owner, the *cestui qui use* could exercise many acts of ownership over the use which no holder of a legal title could enjoy over the land itself. He could devise it, he could alien it,³ and it descended according to the rules of common law in respect to inheritances of land. His right to the land, however, was a mere *chose in action*, a mere right to sue out a subpoena in chancery, and it was liable to be defeated by the alienation of the holder of the legal title. It was subject to the feudal duties of the feoffee to uses, and to the dower of his wife, and to the danger of being forfeited for his treason or felony; and it could not, originally, be enforced against his heir.⁴

In the reign of Richard III. a very important statute⁵ was passed affecting the rights and powers of the *cestui qui use*. That statute, after reciting the mischiefs growing out of un-

¹ Stat. 1 Ric. III., c. 5.

² Sanders, 55, 61, 62; 1 Spence Eq. 445.

³ But a subpoena was not assignable in case of a bare trust and confidence. See

Bacon, Uses, note to p. 16, Rowe's edition. See Moyle Finch's Case, 4 Inst. 86.

⁴ Sanders, 67; 1 Spence Eq. 445.

⁵ 1 Ric. III., c. 1.

known and privy feoffments, provided in substance that the *cestui qui use* should have the power of alienating not only the use but the possession also, or, in other words, that an alienation by the *cestui qui use* should "have the same effect as if he had the legal ownership."

It has been argued by Mr. Sanders that prior to the statute of Richard III. it had been determined that on a feoffment for life or in tail, or a grant for a term of years, there could be no declaration of a use, and that a subpœna would not lie against a person so seized, the reason being "that as to the estate or seizin of a tenant in tail no use could be limited upon it: first, because the tenure of itself created a valuable consideration; and, secondly, because the statute *de donis* had appropriated and fixed the estate tail to the donee and the heirs of his body, so that neither he nor they could execute the use;" and as to the tenant for life, "the consideration of tenure between the lessor and lessee appears to have been incompatible with the use;"¹ while as to the interest of a termor, "it was supposed that the contract between the lessor and lessee, and the consideration upon which the latter took the lease, were incompatible with and repugnant to the nature of a use declared to any other person."

The point is not of any great practical importance, except as illustrating the gradual extension of equitable interests to all degrees of estates, for the statute of Henry VIII. included uses declared upon the seizin of a tenant for life (showing their existence at that time); and courts of equity, after the passage of that statute, began to enforce confidences declared upon terms for years, not as the old-fashioned uses, but as trusts.²

The point is also of importance as showing the true nature and extent of a *trust*, for, the definition sometimes given of a trust, viz., that it is a use not executed by the statute of Henry VIII.,³ is too limited, if *use* is employed in its strict technical sense.

The modern trust includes not only those technical *uses* which

¹ Sanders U. and T. 28. It will be observed that this argument has no application where the life estate was not *created* but merely *transferred* by the conveyance. See Lewin, 6; 1 Cruise Real. Prop. 350.

² See Sanders, U. and T. 32.

³ 1 Cruise Real Prop. 380; Perry on Trusts, 800.

were not executed by the statute, but also equitable interests which never were considered uses,¹ and did not, therefore, fall within the provision of the statute. These equitable interests, in common with the unexecuted uses, received the name of trusts. It may be remembered here that the term trust did not include every interest in land recognized in the Court of Chancery. The equity of redemption of a mortgagor, for example, was an equitable interest analogous to a trust, but nevertheless distinct and different from it.²

To return to the statute of Richard III.; a difficulty arose which seems not to have been foreseen, viz., that while the power of alienation was conferred upon the *cestui qui use*, no restraint was imposed upon the like power which already existed in the feoffee to uses. Hence if a conveyance were made by the latter, his alienee might and did interfere with the enjoyment of the alienee of the *cestui qui use*. This highly unsatisfactory condition of titles led, among other things, to the enactment of the famous statute of uses, 27 Henry VIII., c. 10.

53. The provisions of this statute are well known. It enacted in substance that wherever any person, by any assurance, stood seized to the use of another for any estate, the *cestui qui use* should be deemed to be in lawful seizin and possession of the same estate in the land itself as he had in the use. In the language of conveyancing, it transferred the use into a possession, or executed the use. Its object, according to the preamble, was "for the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses, and errors heretofore used and accustomed in this realm, . . . and to the intent that the king's highness or any other his subjects of this realm shall not in any wise hereafter, by any means or inventions, be deceived, damaged, or hurt by reason of such trusts, uses, and confidences;" and in addition to conferring upon the *cestui qui use* the legal title to, and the possession of the land, it gave him the power to protect his possession by action or entry against any person "for any waste, disseizin, trespass, condition broken, or any other offence" touching the same.

¹ Sanders U. and T. 32.

² *Id.* 279; *Tucker v. Hunstan*, 17 Ves. 133.

Besides this statute, parliament in the same year passed another act for the purpose of putting a stop to secret conveyances. This was the statute for "enrolment of bargains and sales,"¹ which provided for the registration of all bargains and sales of land whereby any estate of inheritance or freehold should be made to take effect in any person, or any use of the same should be made.

The objects, however, which these statutes professed to have in view were soon defeated.

The statute in regard to bargains and sales provided only for the enrolment of such deeds as attempted to pass freehold estates, and did not apply to terms for years. Hence arose the well-known system of conveyance by lease and release, whereby a lease for a year was made, by bargain and sale, and the lessee then being in possession by virtue of the statute of uses, became capable of receiving a release of the fee.

The construction placed upon the statute of uses, also, limited its operation to a great degree.

It was considered that copyholds did not fall within the purview of the statute, because it was against the nature of copyhold tenure, that any one should be introduced into the estate without the consent of the lord.² It was decided that a use limited upon a use was not executed by the statute;³ and also that where the feoffee to uses was to convey the land, or to collect and pay over the profits, the use was not executed.⁴ The uses which were not executed by the statute have been grouped by Mr. Sanders into six classes as follows: 1. Contingent uses, which are not executed during the suspense of the contingency; 2. Uses limited of copyheld lands; 3. Devises to uses;⁵ 4. Active trusts, such as to pay over profits, convey, or sell; 5. Uses limited of chattel interests; 6. A use upon a use.⁶ Probably, however, all the classes into which the uses which survived the statute have been divided, may be grouped under two general heads:

¹ 27 Henry VIII., c. 16.

Dyer, 155 a; *Doe d. Lloyd v. Passingham*, 6 Barn. & Cres. 305; Sanders, 276.

² Gilbert's Tenures, 170; Co. Litt. 272, a; Butler's Notes, § viii. 2.

⁴ Sanders, 253.

³ 36 Hen. VIII., B. N. C. 284. This was the decision of the common law courts, so that the statute of uses does not seem to have been very popular. Tyrrel's Case,

⁵ Though as to this, see *Doe dem Cooper v. Finch*, 4 Barn. & Ad. 305.

⁶ Sanders on Uses, 240 *et seq.*

first, those uses which, though falling within the terms of the statute, were released from its operation by the construction put upon it by the courts, of which the use upon a use is an example; and, *second*, those uses which did not fall within the language of the statute, such as uses of chattel interests. Whatever subdivision, however, may be suggested by the convenience or fancy of authors, all of these equitable interests, now under consideration, may be treated as embraced in the one great family of modern trusts, the origin of which having been noticed, it will now be proper to proceed to the consideration of their different kinds, their manner of creation, and the purposes for which they are ordinarily called into existence.

54. Trusts in respect of the general nature of the duties of trustees, and the objects for which the trust is created, may be divided into active and passive, lawful and unlawful, executed and executory, private and public.

An active or special trust scarcely requires definition. It exists when a trustee has certain duties to perform which render it necessary for the purposes of the trust, that the legal title should remain in him. When this is the case the *cestui qui trust* is entitled only to the beneficial interest, and cannot call upon the trustee to convey. For example, where there is a trust for the payment of debts, the trustee must necessarily have the legal title of the trust property in him in order to get in the assets, turn them into cash, and discharge the liabilities. The creditors whose debts are to be paid have, therefore, no right to the legal title of the property or to its possession. They have simply an interest, which a court of equity will protect, in seeing that the trust is properly carried out.

A passive (or, as it is sometimes called, a simple) trust has been defined to be a trust in which the property is vested in one person upon trust for another, and the nature of the trust, not being qualified by the settlor, is left to the construction of the law. In this case the *cestui qui trust* has *jus habendi*, or right to be put in actual possession of the property, and *jus disponendi*, or the right to call upon the trustee to execute conveyances of the legal estate as the *cestui qui trust* directs.¹

¹ Lewin, 21.

55. A trust which at the time of its creation is a simple or passive trust, will be executed by the statute of uses, the mere circumstance that the word "trust" is used instead of the word "use" making no difference.¹ But where a trust which has been once active becomes passive, or where for any reason the trustee is the holder of a mere dry legal estate, such a trust is not executed by the statute, but the legal title will remain in the dry trustee. The trustee, however, is bound to convey the legal title at the request of the *cestui qui trust*.² In Pennsylvania, however, it has been decided that where there is a mere dry trust, no conveyance is necessary to vest the legal title in the *cestui qui trust*.³ But other authorities in the same State have held that a conveyance may be necessary, or at all events desirable, in order to prevent any doubt or cloud from resting on the title of the *cestui qui trust*.⁴ At one time no court possessed of equity powers existed in Massachusetts. It was accordingly held, while the law was in that condition, that a trust should be treated as a use executed, unless such a construction would be repugnant to the manifest intention of the instrument.⁵ It will be remembered, however, that the courts of that State now have equity powers.⁶

In some States, as in New York, Michigan, Louisiana, and Wisconsin, trusts have been abolished, except within very narrow limits. In the State last named, however, it has been held that passive trusts only were abolished by the statute, and that active trusts may still be created.⁷

The provisions of the statute of uses, and the construction put upon that act, have been already explained.⁸ In nearly all of the United States this statute is in force, or its provisions

¹ *Austen v. Taylor*, 1 Eden, 361; *Lewin on Trusts* (4th ed.), 161.

² *Hill on Trustees*, 316; *Leonard's Lessee v. Diamond*, 31 Maryl. 541; *Sherman v. Dodge*, 28 Verm. 30.

³ *Kuhn v. Newman*, 2 Casey, 227; *Rush v. Lewis*, 9 Harris, 72; *Bush's Appeal*, 9 Casey, 85; *Bacon's Appeal*, 7 P. F. Sm. 504; *Rife v. Geyer*, 9 *Id.* 393; *Freyvogle v. Hughes*, 6 *Id.* 228; *Westcott v. Edmunds*, 18 *Id.* 37.

⁴ *Kay v. Scates*, 1 Wright, 31; *Dodson v. Ball*, 10 P. F. Sm. 492. See, also, in this connection, *Hayes v. Tabor*, 41 N. Hamp. 621.

⁵ *Norton v. Leonard*, 12 Pick. 157.

⁶ *Ante*, p. 20, note.

⁷ *Goodrich v. The City of Milwaukee*, 24 Wis. 429.

⁸ *Ante*, pp. 60, 61.

have been adopted by legislative enactments.¹ The only exceptions to this rule appear to be Vermont,² Tennessee, and Ohio,³ and, to a limited extent Virginia, North Carolina, Florida, Mississippi, Kentucky, Illinois, and California.⁴ Even in some States where the statute is not in force, and has not been supplied, uses are executed by a sort of common law.⁵ This theory was, indeed, pushed to great lengths in Pennsylvania, where it was at one time held that *equitable* were converted into legal estates in all cases except those of active trusts, and even *then* when the purposes of the trust did not furnish any legitimate reason for preserving it from being executed in the beneficiary.⁶ But this extreme position was subsequently abandoned by the courts, and the law restored to its former basis.⁷

The general tendency of the American courts is, perhaps, to give a very liberal effect to the statute of uses and the kindred acts. Thus the strict rule adopted in Tyrrel's case, that a use limited upon a use will not be executed, has been disapproved in Massachusetts;⁸ and it has been doubted by a learned author whether the rule in Tyrrel's case is to be regarded as a rule of construction in all or any of the United States.⁹

It must be remembered that the statute of uses did not extend to personalty; and this is perhaps the general rule throughout the United States, although the subject is, of course, regulated by the language of the particular statute in each State.¹⁰

When active duties are to be performed by the trustee, the

¹ See Perry on Trusts, § 299, note, for a detailed statement of the statutes and decisions in the different States; also Hill on Trustees, 230, note. See, also, Hutchins v. Heywood, 50 N. Hamp. 497.

² Gorham v. Daniels, 23 Verm. 600.

³ Helfenstein v. Garrard, 7 Ham. 276.

⁴ Perry on Trusts, § 299.

⁵ Bacon v. Taylor, Kirby, 365; Bryan v. Bradley, 16 Conn. 483; Guest v. Farley, 19 Missouri, 149.

⁶ Kuhn v. Newman, 2 Casey, 227; Whichcote v. Lyle, 4 Casey, 73; Bush's Appeal, 9 Casey, 83.

⁷ Barnett's Appeal, 10 Wright, 392; Shankland's Appeal, 11 Id. 113. See,

also, Bacon's Appeal, 7 P. F. Sm. 504. In Ogden's Appeal, 20 P. F. Sm. 501, there was a trust for the sole and separate use of a *feme sole* not in contemplation of marriage; and it was held, that, as the separate use was void, the trust fell to the ground in spite of the fact that the trustees had active duties to perform. Consult, also, Yarnell's Appeal, 20 P. F. Sm. 235.

⁸ Per Dana, C. J., in Thatcher v. Omans, 3 Pick. 528.

⁹ 1 Greenleaf's Cruise on Real Prop. 353, note. See, however, Croxall v. Sherrerd, 5 Wallace, 282.

¹⁰ Perry on Trusts, § 303.

rule in the United States is generally the same as in England, and the trust will not be executed.¹

56. Trusts may be either *lawful* or *unlawful*. A lawful trust is one which is created for some fair and honest purpose recognized by law; such as for the payment of debts, for a married woman, for a proper charity, or the like. Trusts are unlawful when they are created for some object which is in contravention of public policy, or in violation of statutes. Thus a trust for a vicious or immoral purpose would be void at common law, because it is against public propriety and policy. So trusts in violation of the statutes of mortmain, of the statutes in regard to aliens, or of the law against accumulation, or the creation of perpetuities, are also bad.² Equity, while it creates a new title, viz., the trust, will not uphold it for the purpose of violating the law.

57. Trusts are also either *executed* or *executory*. These terms have been already defined.³ The test, according to Lord St. Leonards, is this: Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is; or has he so defined that intention that you have nothing to do but to take that which he has given to you and to convert them into legal estates?⁴

In an executed trust the instrument must be interpreted according to the rules of law, which are, in general, the same for equitable as for legal estates, although by such interpretation the *intention* may be defeated. Thus, if an estate is given to A. and his heirs, in trust for B., for life, with remainder to the heirs of B., the interest which B. will take will be construed under

¹ Stanley v. Colt, 5 Wallace, 119, 168; Leggett v. Perkins, 2 Comst. 297; Morton v. Barrett, 22 Maine, 261; Exeter v. Odiorne, 1 New Hamp. 232; Ashhurst v. Given, 5 W. & S. 327; Chapin v. Universalist Soc., 8 Gray, 580. A trust to "permit and suffer" the *cestui qui trust* to receive the rents and profits of an estate is not an active trust. Wagstaff v. Smith, 9 Ves. 520; Perry on Trusts, § 306; Hill on Trustees, 233.

² It would be impossible in a work like the present to notice these statutes in detail—they vary in different States. See Perry on Trusts, chap. xiii.

³ *Supra*, Introduction, chap. ii., p. 26.

⁴ Egerton v. Brownlow, 4 H. L. Cas. 1, 210. Sackville-West v. Holmesdale, L. R. 4 H. L. Cas. 565; Glenorchy v. Bosville, 1 Lead. Cas. Eq 1, and notes.

the rule in Shelley's case to be a fee. But if the instrument were designed to be merely a minute or draft of a scheme for settling an estate, the same provisions would be construed as indicating an intention to give B. an estate for life only, and that his heirs should take by purchase. When, therefore, the formal instrument, by which the minute is to be carried out, comes to be drawn, a court of equity will see that a settlement is made which will in due form of legal conveyancing carry out the intention of the creator of the trust—that is, the conveyance will be drawn in such a way that B. will take but a life estate, and the parties intended to be described by the word “heirs,” will take as purchasers in remainder.¹

The distinction between executed and executory trusts was once much shaken by the decision of Lord Hardwicke, in *Bagshaw v. Spencer*;² but that learned chancellor subsequently receded from his position,³ and the difference between the two classes of trusts is now well settled, both in England and America.⁴

In ascertaining the *intention* in cases of executory trusts, it must be remembered that in marriage articles there is always supposed to be a design to benefit the issue of the proposed marriage; but no such intention is presumed to exist in regard to wills. A chancellor, therefore, in decreeing a settlement in conformity with marriage articles, will always take care that the issue are provided for; but no such care will be taken in the case of wills, unless in obedience to some intention expressed in the will.⁵ As to what will be sufficient evidence of intention, the authorities are not, perhaps, altogether uniform.⁶

Where, however, the intention of the testator to benefit the issue sufficiently appears, the settlement will be made in such a

¹ *Sackville-West v. Holmesdale*, L. R. 4 H. L. Cas. 565; *Wood v. Burnham*, 6 Paige, 513; 26 Wend. 9; *Porter v. Doby*, 2 Rich. Eq. 49; *Glenorchy v. Bosville*, 1 Lead. Cas. Eq. 20, and notes; *Perry on Trusts*, § 359.

² 2 Atk. 142; 1 Ves. 142, 152.

³ *Exel v. Wallace*, 2 Ves. 323.

⁴ *Dennison v. Goehring*, 7 Barr, 177; *Wood v. Burnham*, 6 Paige, 518; 26 Wend.

9; *Horne v. Lyeth*, 4 H. & J. 434; *Garner v. Garner*, 1 Dessaus. 444; *Loving v. Hunter*, 8 Yerger, 31; *Edmundson v. Dyson*, 2 Kelley, 307; *Berry v. Williamson*, 11 B. Mon. 245.

⁵ *Blackburn v. Stables*, 2 Ves. & B. 369; *Sweetapple v. Bindon*, 2 Vern. 536; *Perry on Trusts*, §§ 360, 366

⁶ See Am. note to *Glenorchy v. Bosville*, *ut sup.*

manner as to effectuate that intention.¹ There is, indeed, no difference between the rules applicable to marriage articles and those in regard to wills, further than this, viz., that in the former instruments *res ipsa loquitur*, the occasion itself testifies what the paramount object of the parties must have been.²

Where there are executory trusts of personalty, heirlooms, etc., as to which the ordinary limitations applicable to real estate would defeat, in many instances, the intention of the testator, because it would give a tenant in tail (for instance) absolute control, equity will see that the limitations are of such a nature as to prevent the intention from being defeated.³

58. A court of equity will entertain jurisdiction not only for the purpose of carrying out executory trusts, and seeing that the instrument which purports to fulfil the intention of the settlor really does so, but also for the purpose of reforming conveyances which have been improvidently drawn, and by which the objects sought to be reached by the executory minute or draft have not been attained. Where such an improvident instrument has been executed, equity will, as a general rule, reform it, and order it to be re-drawn in such a way as to effectuate the intention of the parties.⁴ But where both articles and settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and will control the articles.⁵

If the intention expressed in the minute cannot be carried out without violating some statute or policy of the law, equity will carry it out as nearly as possible, so as to reconcile, as far as may be, the law and the intention of the settlor.⁶

59. In regard to the division of trusts into public and private trusts, it will be sufficient to remark that public trusts are such

¹ *Sackville-West v. Holmesdale*, L. R. 4 H. L. Cas. 565. well, 1 Hill Eq. 101; *Allen v. Rumph*, 2 *Id.* 1.

² *Id.* This case contains a very full discussion of the law upon this point.

³ *Stanley v. Leigh*, 2 P. Wms. 690; *Scarsdale v. Curzon*, 1 Johns. & H. 40; *Shelley v. Shelley*, L. R. 6 Eq. 546.

⁴ *Warrick v. Warrick*, 3 Atk. 293. See also *Neves v. Scott*, 9 Howard, 197; *Gause v. Hale*, 2 Ired. Eq. 241; *Smith v. Max-*

⁵ *Legg v. Goldwire*, Cas. t. Talbot, 20; 1 Lead. Cas. Eq. 17. Unless it is shown that the discrepancy arose from a clear mistake, in which case the settlement will be reformed. *Bold v. Hutchinson*, 5 D. M. & G. 558.

⁶ *Humberston v. Humberston*, 1 P. Wms. 332; S. C., 2 Vern. 737; *Prec. Ch.* 455.

as are constituted for the benefit either of the public at large, or of some considerable portion of it answering a particular description; and that private trusts are those wherein the beneficial interest is vested absolutely in one or more individuals who are, or within a certain time may be, definitely ascertained, and to whom, therefore, collectively, unless under some legal disability, it is competent to control, modify, or determine the trust.¹ The principal difference in the nature of the two kinds of trusts is that those of a public character are not confined within the limits prescribed for settlements upon private trusts, but are of a more permanent and lasting character. This distinction will be more fully noticed when the subject of charitable trusts (which, indeed, have been said to be synonymous with public trusts)² is considered.³

In private trusts the devolution of the *cestui qui trust's* estate, and the incidents of his ownership, are, as a general rule, the same as those of legal estates.

60. The rules for the descent of equitable estates are the same as those which regulate the devolution of legal titles; equitable interests are within the statute of distributions; and, it is presumed, fall under the operation of the intestate acts throughout the United States.⁴ Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate.⁵ A husband is entitled to an estate by the curtesy in his wife's equitable estates of inheritance; and he will be entitled, at common law, to her equitable personalty except in so far as his rights are controlled by the doctrine of the wife's equity to a settlement.⁶ By an anomalous decision, however, a wife in England is not dowable of a trust estate.⁷ But the rule in most of the United States appears to be different, it having, in some States, been altered by statute;⁸ and the point in England has ceased to be of practical importance.⁹

¹ Lewin, 23.

² *Id.*

³ *Post*, chap. V.

⁴ Lewin on Trusts, 680; Fairies' Appeal, 11 Harris (Pa.), 29.

⁵ Burgess v. Wheate, 1 Black. R. 155, 161; Croxall v. Shererd, 5 Wallace, 281;

¹ Cruise on Real Prop. 387.

⁶ Hill on Trustees, 405; 4 Kent's Com., 30; *post*, chap. IV.

⁷ D'Arcy v. Blake, 2 Sch. & Lef. 387.

⁸ Williams on Real Prop. 214, note; Dubs v. Dubs, 7 Casey, 149.

⁹ By the passage of the Dower Act, 3 and 4 Wil. IV., c. 105.

Before the statute of uses it had been decided that the estate of the *cestui qui use* was not subject to forfeiture and escheat, but that the feoffee to uses became, thereupon, the absolute owner.¹ After the statute the same rule was applied to trusts.² By subsequent statute the estate of the *cestui qui trust* was forfeited for treason;³ but upon forfeiture for felony or escheat, the trustee took the estate discharged of the trust.⁴ But this rule does not apply to chattels nor to an equity of redemption.

In the United States, the opinion is that the State would take both real and personal property as *ultimus hæres*. If the legal title to real estate cannot be taken by an alien, the beneficial ownership cannot be enjoyed by him.⁵

61. The right of alienation, by deed and will, attaches to equitable estates, and any restrictions upon that right are invalid, and moreover the incident of involuntary alienation, or, in other words, the liability of the estate to be taken in execution for the debts of the beneficial owner, also applies to such estates. There may, indeed, be a limitation over upon the bankruptcy or insolvency of the *cestui qui trust*, or upon the happening of any event whereby the property may belong to some other person; and such limitations are of frequent occurrence.⁶ But the *cestui qui trust* cannot hold the property for the purposes of enjoyment freed from the duty of applying it in discharge of his obligations.⁷ It is a settled rule of law that the beneficial interest of the *cestui qui trust*, whatever it may be, is liable for the payment of his debts, and it cannot be so fenced about by inhibitions and restrictions, as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it

¹ See *Burgess v. Wheate*, 1 Eden, 199.

² *Att. Gen. v. Sands*, 1 Hale P. C. 249.

³ 33 Hen. VIII., c. 20.

⁴ *Att. Gen. v. Sands*; *Burgess v. Wheate*. See also *Onslow v. Wallis*, 1 Mac. & G. 506; *Sweeting v. Sweeting*, 33 L. J. Ch. 211.

⁵ *Du Hourmelin v. Sheldon*, 1 Beav. 79; 4 M. & C. 525; *Atkins v. Kron*, 5 Ired. Eq. 207; *Hubbard v. Goodwin*,

3 Leigh, 492; *Leggett v. Dubois*, 5 Paige, 114; *Taylor v. Benham*, 5 Howard, 270.

See also *Sharp v. St. Sauverne*, L. R., 7 Ch. App. 852; overruling *Rittson v. Stordy*, 3 Sm. & Giff. 230; and approving *Barrow v. Wadkin*, 24 Beav. 1.

⁶ See Williams on Real Prop. 87, and notes.

⁷ *Dumpor's Case*, 1 Sm. Lead. Cases, 119, Judge Hare's note.

shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go.¹ This is the general rule throughout the United States and in England. In some of the States of the Union, however, a different doctrine has been held. Thus in Pennsylvania it is now firmly established by many authorities that a proviso exempting the estate of the *cestui qui trust* from liability for his debts, and where he is excluded from the control of the property,² will be good without any limitation over.³ And this rule seems also to exist in Connecticut, Virginia, Kentucky, and Alabama.⁴

62. Certain exceptions to the rules above stated, in regard to the devolution of trust estates, and the powers of the *cestui qui trust*, exist in the case of trusts for married women, and will be noticed when that particular class of trusts comes under consideration.

Another exception formerly existed in England in relation to attendant terms, trusts of which, though of chattel interests, followed the descent of the inheritance which they were designed to protect. But the doctrine of attendant terms is now obsolete in England;⁵ and was never of any practical importance in this country.⁶

Trust estates also follow the law of legal estates as to the injuries which may affect them and the consequences of these injuries. Thus, although the terms *seizin* and *disseizin* are not strictly applicable to equitable estates, a court of equity regards

¹ *Nichols v. Levy*, 5 Wallace, 441; *Hallett v. Thompson*, 5 Paige, 583; *Dick v. Pitchford*, 1 Dev. & Bat. (Eq.) 480; *Blackstone Bank v. Davis*, 21 Pick. 42; *Brandon v. Robinson*, 18 Vesey, 429. See *Hutchins v. Heywood*, 50 N. Hamp. 491, where it was held that a resulting trust (arising from the payment of the consideration by one man, where the title was taken by another) was executed by the statute of uses, and could be levied upon and sold under ordinary process.

² See *Adams's Eq.* 43.

³ *Fisher v. Taylor*, 2 Rawle, 33; *Ash-*

hurst v. Given, 5 Watts & Serg. 323; *Vaux v. Park*, 7 *Id.* 19. But even in Pennsylvania a person *sui juris* cannot make a settlement on himself free from liability for debts. *MacKason's Appeal*, 6 Wright, 330.

⁴ *Leavitt v. Beirne*, 21 Conn. 8; *Markham v. Guersant*, 4 Leigh, 279; *Johnson v. Zanes's Trustees*, 11 Grat. 570; *Pope v. Elliott*, 8 B. Mon. 56; *Hill v. McRae*, 27 Ala. 175; and see *Genet v. Beekman*, 45 Barb. 382.

⁵ Stat. 8 and 9 Vic., c. 112.

⁶ See 4 Kent's Com. 87.

the actual receipt of rents and profits under the equitable title as equivalent to seizin at law, and an adverse perception of the rents and profits as amounting to an ouster.¹ Moreover, if such adverse enjoyment of the equitable estate continues for twenty years, it would, by analogy to the statutes of limitations applicable to legal titles, bar any assertion by the *cestui qui trust* of his right in equity.²

CHAPTER II.

EXPRESS TRUSTS; AND HEREIN OF VOLUNTARY DISPOSITIONS IN TRUST, OF PRECATORY TRUSTS, AND OF POWERS IN TRUST.

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| 63. Trusts created by direct fiduciary expressions; trusts averrable at Common Law.
64. Statute of Frauds.
65. Language by which a Trust may be created.
66. Voluntary dispositions in trust; <i>Milroy v. Lord</i> ; <i>Ex parte Pye</i> .
67. General result of the authorities; <i>Donaldson v. Donaldson</i> ; <i>Kekewich v. Manning</i> .
68. Voluntary Assignments for the benefit of Creditors. | 69. Meritorious Consideration; <i>Ellis v. Nimmo</i> .
70. <i>Donatio mortis causa</i> .
71. Trusts created by Precatory Words.
72. Doctrine on this subject in England; in the United States generally; in Pennsylvania and Connecticut.
73. What precatory words will create a trust.
74. Such words <i>prima facie</i> imperative.
75. Certainty of the object is an element for consideration.
76. Certainty of the Subject.
77. Powers in Trust; <i>Salisbury v. Denton</i> . |
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63. EXPRESS trusts, being those which are created by the language of the parties, may, it is obvious, arise either by direct fiduciary expressions whereby the relationship of trustee and *cestui qui trust* is distinctly established, or by expressions of a more uncertain and equivocal character which might not in the opinion of a layman be considered as indicating an intention to create a trust, but which have been construed by a series of judicial decisions to be effective in so doing.

Before, however, considering the question as to what language

¹ Lewin on Trusts, 466 (4th Eng. ed.); ² Story's Eq., § 975.
 Story's Eq., § 975.

is necessary to create a trust, it will be proper to premise that at common law, trusts both of real and personal property could be created by parol. A trust of realty, like a use, was in technical language "averrable," that is, it could be created by word of mouth.¹ The better opinion is, however, that this is only true of those cases in which the legal estate could be created by feoffment, where (of course) no writing was necessary. But when a deed was requisite for the conveyance of the legal estate (as in a covenant to stand seized to uses), there uses and trusts were not averrable, but could be created only in the same manner as legal estates.² In Connecticut, it has been held that trusts were not averrable at common law;³ but the weight of American authority is decidedly the other way.⁴

64. The statute of frauds (29 Car. II., c. 3) changed the rule in regard to real estate; and enacted (in the 7th section) that "all declarations or creations of trusts, or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void and of none effect." An assignment of a trust of realty must also be in writing.⁵

This statute applies to chattels real as well as to freehold estates;⁶ though not to mere personal rights concerning land, such as mortgages and charges.⁷

It is to be observed that the statute does not require trusts of realty to be *created*, but only to be manifested and proved by writing. The distinction is of practical importance, because a subsequent written acknowledgment of a trust will cause the interest to relate back to the date of its original creation, so as to bring it (for example) within the operation of a will of the

¹ Lewin on Trusts, 56; Perry on Trusts, § 75; Fordyce v. Willis, 3 Bro. C. C. 587. Hubert, 7 Barr, 420; Anding v. Davis, 9 George (Miss.), 574.

⁵ See 29 Car. II., §§ 7, 8, 9.

² Gilbert on Uses, 270.

³ Dean v. Dean, 6 Conn. 285.

⁴ Fleming v. Donahoe, 5 Ohio, 257; Miller v. Thatcher, 9 Texas, 482; Osterman v. Baldwin, 6 Wal. 116; Shelton v. Shelton, 5 Jones (Eq.) 292; Murphy v.

⁶ Skett v. Whitmore, Freem. 280; Riddle v. Emerson, 1 Vern. 108; and see Hutchins v. Lee, 1 Atk. 447; Bellasis v. Compton, 2 Vern. 294.

⁷ Benbow v. Townsend, 1 M. & K. 506; Bellasis v. Compton, 2 Vern. 294. See Perry on Trusts, § 86.

cestui qui trust executed *before* the written acknowledgment, but *after* the verbal creation.¹

This statute has been re-enacted in most of the United States; in some of which, however, the language of the statute has been somewhat varied. Thus in Maine, trusts must be "created and declared in writing."² In Illinois, "declarations or creations of trusts must be manifested and proved" in writing.³ The statutes of Vermont and Massachusetts are similar.

It is considered, however, by a learned writer, that this variation of language does not produce any substantial difference in the effect of the statutes, but that under all of them it will be sufficient if the trust is proved by some writing, although executed after its creation.⁴

Personal chattels are not within the statute of frauds; and trusts of them may be proved by parol.⁵ Implied trusts are expressly excepted from the operation of the statutes in most of the States.

The statute of frauds will be satisfied by any writing, no matter how informal. Thus a mere letter or memorandum will be enough.⁶ The writing, however, must declare with sufficient *certainty what the trust is*.⁷

An answer in chancery admitting the trust will be sufficient to take it out of the statute;⁸ but the better opinion seems to be that this will not be the rule if the defendant chooses to insist upon the benefit of the statute.⁹ If the answer denies the agree-

¹ *Ambrose v. Ambrose*, 1 P. Wms. 322; See also *Foster v. Hale*, 3 Ves. Jr. 696, and *Sims v. Howard*, 4 Nevada, 483.

² Rev. Stats. (1857) ch. 73, § 11, p. 450. See *Gerry v. Stimson*, 60 Maine, 188.

³ Rev. Code of 1860, § 2213.

⁴ *Perry on Trusts*, § 81; and see *Bragg v. Paulk*, 42 Maine, 502, and *Sims v. Howard*, 4 Nevada, 482.

⁵ *McFadden v. Jenkyns*, 1 Hare, 461; 1 Ph. 157; *Benbow v. Townsend*, 1 M. & K. 506; *Hawkins v. Gardner*, 2 Sm. & Giff. 451; *Kimball v. Morton*, 1 Halst. Ch. 31; *Higgenbottom v. Peyton*, 3 Rich. Eq. 398; *Kirkpatrick v. Davidson*, 2 Kelly, 297; *Day v. Roth*, 18 N. Y. 448; *Hooper v. Holmes*, 3 Stock. (Ch.) 122; *Barkley v. Lane*, 6 Bush (Ky.) 587.

⁶ *Dale v. Hamilton*, 2 Phillips, 266; *Foster v. Hale*, 3 Ves. Jr. 696; 5 Ves. Jr. 308; *Raybold v. Raybold*, 8 Harris (Pa.), 308; *Maccubbin v. Cromwell*, 7 Gill & J. 164. See *Reid v. Reid*, 12 Rich. Eq. 213.

⁷ *Steere v. Steere*, 5 J. C. R. 1; *Smith v. Mathews*, 3 D. F. & J. 139; *Cook v. Barr*, 44 New York, 161.

⁸ *Maccubbin v. Cromwell*, 7 G. & J. 164; *Cozine v. Graham*, 2 Paige (Ch.) 177; *Nab v. Nab*, 10 Mod. 404, *per* Lord Chancellor Parker.

⁹ *Dean v. Dean*, 1 Stock. (Ch.) 425; *Whitney v. Gould*, 2 Wis. 552; *Perry on Trusts*, § 85.

ment upon which the trust is based, it need not expressly set up the statute, in other words, take the defence that the agreement was in parol.¹

A trust may be created by will ; but to be valid, the will must be duly executed. A writing which purports to be a testamentary paper, if not properly executed to take effect as a will, cannot be relied upon as a memorandum to satisfy the statute.²

65. Having premised thus much concerning the *instrument* which is needed in order to create a valid trust, we must now consider what *language* should be used in order that a trust may be created.

“Three things,” it has been said,³ “must concur to raise a trust, sufficient words to create it, a definite subject, and a certain or ascertained object ;” and to these requisites may be added another, viz., that the terms of the trust should be sufficiently declared.⁴

The precision with which it is necessary to define the subject-matter, and the object of the trust, will be noticed when we come to consider powers in trust, and that class of expressions which are known as precatory words. Putting these aside for the present, it may be said, that there must in general be sufficient words to create a trust ; but that no particular form of expression is necessary. It will be enough if there be a complete intention, expressed with sufficient clearness.

The intention must be a complete one. A mere inchoate and executory design is not enough,⁵ and unless there is some distinct equity (as fraud, for example), it cannot be enforced.⁶ The intention must be plainly manifested and not derived from loose and equivocal expressions of parties made at different times and upon different occasions.⁷ But any words which indicate,

¹ Wolfe v. Corby, 30 Maryl. 360 ; Ontario Bank v. Root, 3 Paige (Ch.) 478 ; Billingslea v. Ward, 33 Maryl. 51 ; Allen v. Chambers, 4 Ired. Eq. 125.

² Perry on Trusts, § 89 to § 94 ; Lewin on Trusts, 66, 47 (4 Eng. ed.).

³ By Sir William Grant, in Cruwys v. Coleman, 9 Vesey, Jr. 323. See also Knight v. Boughton, 11 Cl. & Fin. 513 ; and Malim v. Keighley, 2 Vesey, Jr. 335.

⁴ Knight v. Boughton, 11 Clark & Fin. 513.

⁵ Bayley v. Boulcott, 4 Russ. 345 ; Harrison v. McMenomy, 2 Edw. Ch. 251. See also Kilpin v. Kilpin, 1 M. & K. 520.

⁶ Donahoe v. Conrahy, 2 Jon. & Lat. 694.

⁷ Slocum v. Marshall, 2 Wash. C. C. 398 ; Steere v. Steere, 5 Johns. C. R. 1 ; Mercer v. Stark, 1 Sm. & Marsh. (Ch.) 479 ; Harris v. Barnett, 3 Grat. 339 ; Barkley v. Lane, 6 Bush (Ky.) 587.

with sufficient certainty, a purpose to create a trust, will be effective in so doing.¹

It is not necessary that the terms "trust" and "trustee" should be used;² any other words which show that the donee was not intended to take beneficially, will affect his conscience with a trust.³

The declaration of trust may be contained in a different instrument from that by which the estate is vested in the trustee;⁴ but the instruments must be contemporaneous, or, at all events, in contemplation at the same time; and if an absolute conveyance is made, no *subsequent* declaration can deprive the grantee of his beneficial interest.⁵

As to the *quantity* of the estate which the *cestui qui trust* is to take, it is only necessary that the intention upon the subject should be clearly expressed; and it is not necessary that the technical words required in the limitation of legal estates should be used. Thus an equitable fee may be created without the use of the word "heirs;" and a fee tail without the use of "heirs of the body,"⁶ provided always that the intention to give a fee sufficiently appears. Where a trust is created by a *devise* by which

¹ Fisher v. Fields, 10 J. R. 495; Carpenter v. Cushman, 105 Mass. 419; Norman v. Burnett, 25 Miss. 183; Porter v. The Bank of Rutland, 19 Verm. 410; Brown v. Combs, 5 Dutch. 36.

² See Lewin, p. 180, note z. Though their absence is a circumstance to be attended to; King v. Denison, 1 V. & B. 273. See also Porter v. Bank of Rutland, 19 Verm. 410; Fisher v. Fields, 10 J. R. 495; Gordon v. Green, 10 Georgia, 534; Norman v. Burnett, 25 Miss. 183. On the other hand, the words "trust" and "trustee" will not necessarily create a trust. Brown v. Combs, 5 Dutch. 36. See also Seldon's Appeal, 31 Conn. 548; Eldridge v. The See Yup. Co., 17 Cal. 44; Att. Gen. v. Merrimac Manufac. Co., 14 Gray, 612; Richardson v. Inglesby, 13 Rich. Eq. 59.

³ Crockett v. Crockett, 1 Hare, 451; Bibby v. Thompson, 32 Beav. 646; Jubber v. Jubber, 9 Sim. 503; Raikes v. Ward,

1 Hare, 445; Inderwick v. Inderwick, 13 Sim. 652; Aynesworth v. Haldeman, 2 Duvall, 571; Day v. Roth, 18 N. Y. 453.

⁴ Inchiquin v. French, 1 Cox, 1; Wood v. Cox, 2 M. & Cr. 684; Stubbs v. Sargon, 2 Keen 255; Smith v. Attersoll, 1 Russ. 266.

⁵ Adlington v. Cann, 3 Atk. 145; Crabb v. Crabb, 1 M. & K. 511; Kilpin v. Kilpin, *Id.* 520, 532. See also Briggs v. Penny, 3 MacN. & G. 546; Johnson v. Ball, 5 De G. & S. 85; Dawson v. Dawson, 1 Chev. (2d Part) 148; Johnson v. Clarkson, 3 Rich. Eq. 305; Wallgrave v. Tebbs, 2 K. & J. 313; Tee v. Ferris, 2 K. & J. 357; Russell v. Jackson, 10 Hare, 204; Lomax v. Ripley, 3 Sm. & Giff. 48; Brown v. Brown, 12 Maryl. 87.

⁶ Shep. Touch., by Preston, 106; Lewin on Trusts, 140; Fisher v. Fields, 10 Johnson, 505.

the fee is given to the trustee, the *cestui qui trust* will be entitled to the beneficial ownership in fee, without an express limitation to his heirs; because it is supposed that the testator intended that the beneficial interest should exhaust the entire legal estate.¹ But in a deed the rule is otherwise.²

Where technical words are used, however, they must be taken in their legal and technical sense;³ except in certain cases of executory trusts, which have been already noticed.

66. It has been said that in order to create a valid trust there must not be merely an inchoate intention, but that the transactions must be complete. This rule, it must be remembered, applies more particularly to trusts which are created by voluntary dispositions, and which may be conveniently considered in this place.

For a trust may arise either out of a contract or out of a gift; and the distinction which it is desirable to remember is this, viz., that in trusts which grow out of contracts, and which are, therefore, based upon a consideration, it is not necessary that the intention should have proceeded to the same extent as is required in trusts which are purely voluntary.⁴ And this is only an application of the rule which exists at common law in reference to the distinction between contracts and gifts, as the former rest *in fieri*, whereas a gift can only be effectual after the intention to make it has been followed by actual delivery of possession or some equivalent act. "A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately. . . . But if a gift does not take effect by delivery of immediate possession, it is not then properly a gift but a contract."⁵ The common law rule, therefore, in reference to the transfer of legal titles, has been followed in equity as to the creation of equitable estates; and trusts which are purely voluntary—that is, those which do not depend upon or grow out of a

¹ *More v. Cleghorn*, 10 Beav. 423; on appeal, 12 Jurist, 591; *Knight v. Selby*, 3 Man. & Gran. 92; *Doe v. Cafe*, 7 Exch. 675; *Watkins v. Weston*, 32 Beav. 238; *Perry on Trusts*, § 337.

² *Holliday v. Overton*, 14 Beav. 467; 15 Beav. 480.

³ *Wright v. Pearson*, 1 Ed. 125; *Glenorchy v. Bosville*, Cas. t. Talb. 19.

⁴ See *Ownes v. Ownes*, 8 C. E. Green, 62; *Perry on Trusts*, § 95.

⁵ 2 Black. Com. 441.

consideration—must, to be effectually created, be accompanied by the delivery of the subject of trust, or by some act so strongly indicative of the donor's intention as to be tantamount to such delivery.¹ The settlor must do all in his power that the nature of the property will admit of to carry out his intention. Lord Justice Turner, in *Milroy v. Lord*,² said that a voluntary settlement could be made in one of three ways: first, by direct transfer or assignment to the donee; second, by assignment to a trustee accompanied by an actual transfer of the legal estate if that is in the settlor; and third, by a declaration that the settlor holds in trust for the donee.³ *Ex parte Pye*⁴ is an old and leading authority upon this branch of the law, and is an illustration of the last of the three classes of cases mentioned in *Milroy v. Lord*. In that case M. wrote a letter by which he requested his attorney in France to purchase an annuity for the benefit of a certain lady. The purchase was made, but the annuity was taken in the name of the writer of the letter, who afterwards sent a letter of attorney to transfer the same to the name of the intended donee. The donor died before the transfer was made, but the news of his death did not reach the attorney until after the transfer. The transfer being good according to the law of France, the court held that there had been a complete declaration of trust.

*Ellison v. Ellison*⁵ may also be referred to as a leading authority upon this subject. "I take the distinction to be that if you want the assistance of the court to constitute you *cestui qui trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui qui trust*; as upon a covenant to transfer stock, etc., if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant; but if the party has completely transferred stock, etc., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court."⁶

¹ See *Cox v. Sprigg*, 6 Maryl. 284; *Taylor v. Staples*, 8 R. Island, 170, 176; *Otis v. Beckwith*, 49 Illinois, 121, 128.

² 4 De G. F. & J: 264.

³ See also the opinion of Vice Chancellor Wood in *Donaldson v. Donaldson*, Kay, 711.

⁴ 18 Vesey, 140.

⁵ 6 Vesey, 656.

⁶ Per Lord Eldon in *Ellison v. Ellison*, 6 Vesey, 662. See also *Stone v. Hackett*, 12 Gray, 227; *Souverbye v. Arden*, 1 Johns. C. R. 240; *Bunn v. Winthrop*, *Id.* 387; *Clarke v. Lott*, 11 Ill. 105; *Crompton v. Vasser*, 19 Ala. 266; *Vruland v. Van Horn*, 2 C. E. Green, 139.

Where, however, a consideration exists, the case is different. A contract then arises which will be enforced by the courts, and equitable interests flowing therefrom will, as between the immediate parties, be as much protected as legal rights. Where the legal or equitable rights of third parties intervene, the rule may be varied.¹

67. The cases upon the subject of voluntary declarations of trusts have been quite numerous, and it is impossible in a treatise like the present to do more than indicate their general results, without discussing the distinctions established by particular authorities.

When a settlor is possessed of the legal title to the subject matter of the settlement, he may create a valid trust thereof, either by a declaration that he holds the property in trust, or by a transfer of the legal title to the property to a third party upon certain trusts. In other words, he may constitute either himself or another person the trustee. If he makes himself the trustee, no transfer of the subject matter is necessary. If he makes a third party trustee, he must transfer to him the subject of the trust in such a mode as will be effectual to pass the legal title. But if there is a mere *intention* to convey the property upon trusts, this will not be sufficient if the proper steps are not taken for the purpose of making a valid transfer of the legal title to the intended trustee.² Such was the case of *Milroy v. Lord*, where a deed of assignment of stock, unaccompanied, however, by a *transfer of the stock*, was held ineffectual to create a trust. The case of *Donaldson v. Donaldson*⁴ may be referred to as an authority upon the creation of voluntary trusts by a declaration that the settlor thereby constitutes himself the trustee, in which case no assignment of the legal title is required.⁵

¹ See *post*, Part II., chapter on Notice.

² *Lloyd v. Brooks*, 34 *Maryl.* 33; *Swan v. Frick*, *Id.* 143.

³ 4 *De G. F. & J.* 264. See also *Jones v. Lock*, 35 *L. J. Ch.* 117; 11 *Jur. N. S.* 913; *Forrest v. Forrest*, 34 *L. J. Ch.* 428; *Scales v. Maude*, 6 *D. M. & G.* 43; *Henderson v. Henderson*, 21 *Missouri*, 379; *Gilchrist v. Stevenson*, 9 *Barb.* 9; and

Cressman's App., 6 *Wright (Pa.)*, 147.

See, however, *Huntly v. Huntly*, 8 *Ired. Eq.* 250.

⁴ *Kay*, 711. See also *Vandenberg v. Palmer*, 4 *K. & J.* 204; *Lane v. Ewing*, 31 *Missouri*, 75.

⁵ If a settlor designs to effect a valid settlement in a certain mode, but the settlement fails to take effect by reason

It must, however, be observed, that, according to the most recent English authorities, an assignment which is ineffectual to pass the legal title may yet take effect as a declaration of trust; so that the result of the abortive attempt on the part of the assignor to convey the legal title, will be (under the view taken in these cases) to constitute him a trustee of that title for the party designed to be benefited.¹ The remarks of Lord Justice Turner, therefore, in *Milroy v. Lord*, must be taken with the qualification introduced by the authorities just cited.²

Where a settlor is not possessed of the legal present title, but has only an equitable or reversionary interest in the subject, a trust may be created either by a declaration that the settlor holds in trust, or by an assignment upon trusts. The first of these methods stands upon the same grounds as declarations of trust of property of which the legal title is in the settlor. An assignment, however, of an equitable interest upon a voluntary trust differs from a like assignment of a purely legal interest, in that no further formalities are necessary in order to complete the transaction, as, the legal title not being in the assignor, he can, of course, take no steps to complete its transfer. A valid voluntary trust of an equitable or reversionary interest may, therefore, be created by a simple assignment.³

It was at one time supposed that in the assignment of equitable interests, notice to the trustees was necessary.⁴ But this does not now seem to be requisite.⁵

68. Voluntary assignments to trustees for the benefit of creditors have been held to constitute an exception to the general rules by which the creation of voluntary trusts is governed;

of an incomplete disposition, it cannot take effect in another mode, not intended by the settlor. *Milroy v. Lord*, 8 Jur. N. S. 806.

¹ *Richardson v. Richardson*, L. R. 3 Eq. 692; *Morgan v. Malleson*, 10 *Id.* 475. See also *Huntly v. Huntly*, 8 Ired. Eq. 250.

² See note to *Ellison v. Ellison*, 1 Lead. Cas. Eq. 262 (4th Eng. ed.). See, also, upon this subject, *Bond v. Insurance Co.*, 30 Leg. Int. 304, where the subject is learnedly discussed.

³ See *Kekewich v. Manning*, 1 De G. M. & G. 176, where the conflict of authority between *Sloan v. Cadogan*, Sug. V. & P. App., and *Fortescue v. Barnett*, 3 My. & K. 36, on the one hand, and *Edwards and Jones*, 1 My. & Cr. 226, and *Meek v. Kettlewell*, 1 Hare, 464, on the other, was settled in favor of the former class of cases. See also *Otis v. Beckwith*, 49 Illinois, 121.

⁴ *Meek v. Kettlewell*, *ut sup.*

⁵ *Way's Trusts*, 2 De G. J. & Sm. 365.

inasmuch as, after such an assignment, but before it is communicated to the creditors, it is considered revocable at the option of the grantor.¹ It was, indeed, said by Sir L. Shadwell, V. C., in *Garrard v. Lord Lauderdale*,² that such a trust was revocable by the assignor even after it had been communicated to the creditors; but this doctrine has not met the approval of subsequent decisions, and cannot be considered sound.³ The doctrine in *Walwyn v. Coutts*, when properly considered, appears to be based upon the ground that in such cases the assignee for the benefit of creditors is not strictly a trustee, but a mere agent of the debtor; and that if the true relation of the parties is that of principal and agent, the ordinary rule in such cases, viz., that the authority of the agent is revocable until acted upon, must apply.⁴ In America, the rule in *Walwyn v. Coutts*, and particularly the dictum in *Garrard v. Lord Lauderdale*, have not been approved. The assent of the debtor is presumed to be given to a trust created for his benefit, and after such assent the trust is irrevocable by the grantor.⁵

Even in England, if a creditor is created a trustee, and the fact of the execution of the deed is communicated to him, the trust will thenceforward be irrevocable.⁶

If the trust for payment of debts is to take effect after the death of the assignor, an element of bounty is introduced which will take the case out of the ruling in *Walwyn v. Coutts*.⁷

69. Before leaving the subject of the creation of trusts by a voluntary disposition, it will be desirable to say a few words upon the question as to whether the meritorious consideration of blood is to be placed upon the same footing as one which is purely voluntary, so far as regards the disposition of courts of equity to enforce any right or supposed right founded thereon.

¹ *Walwyn v. Coutts*, 3 Mer. 707; 3 Sim. 14.

² 3 Sim. 1.

³ *Acton v. Woodgate*, 2 M. & K. 495; *Harland v. Binks*, 15 Q. B. 713.

⁴ See *Bill v. Cureton*, 2 M. & K. 511; 1 Lead. Cas. Eq. 256 (4th Eng. ed.); and Lord Cranworth in *Synnot v. Simpson*, 5 H. L. Cas. 133, 134.

⁵ *Tennant v. Stoney*, 1 Rich. Eq. 223;

England v. Reynolds, 38 Ala. 370; 1 Lead. Cas. Eq. 327; *Perry on Trusts*, § 593. But the presumption of the creditor's assent may be rebutted by conduct. *Gibson v. Rees*, 50 Ill. 383.

⁶ *Siggers v. Evans*, 32 Eng. L. & Eq. 139.

⁷ *Synnot v. Simpson*, 5 H. L. Cas. 141; though see the remarks of Lord St. Leonards in his dissenting opinion, p. 152.

It was decided by Sugden, when Lord Chancellor of Ireland, that the meritorious consideration of blood was sufficient to set the court in motion for the purpose of enforcing an executory trust.¹ But this decision was not followed in England; and the doctrine must be considered as settled the other way, so far as that country is concerned.² In the United States, the authorities are not altogether harmonious.

The English rule has been followed in Pennsylvania,³ and in New York there is a dictum that a meritorious consideration would be sufficient;⁴ while in South Carolina, it is said that a voluntary declaration will be sufficient if under seal.⁵ But the general tendency of the American authorities is the other way.⁶

70. In connection with the subject of voluntary declarations of trust, it might seem proper to notice *donationes mortis causa*, which are introduced, as a distinct head, in many treatises on equity jurisprudence. But a *donatio mortis causa* depends not upon an equitable, but a legal title; and the claim of the donee is not an essentially equitable right.⁷ For the purpose of enforcing a *donatio mortis causa* it is sometimes necessary to resort to the equitable remedy for the administration and settlement of estates at the suits of legatees and others, which will be found noticed in its appropriate place.⁸

71. It has been seen, already, that no particular form of lan-

¹ Ellis v. Nimmo, Ll. & Gould, 333.

² See Holloway v. Headington, 8 Sim. 324; Jefferys v. Jefferys, 1 Cr. & Ph. 138; Dillon v. Coppin, 4 My. & Cr. 647. In Moore v. Crofton, 3 Jones & Lat. 442, Sir E. Sugden was compelled to abandon the position he had taken in Ellis v. Nimmo.

³ Kennedy v. Ware, 1 Barr, 445; Campbell's Estate, 7 Barr, 100; though see Dennison v. Goehring, 7 Barr, 175, and Bond v. Insurance Co., 30 Leg. Int. 304.

⁴ Hayes v. Kershow, 1 Sand. Ch. 261. But the consideration of collateral consanguinity will not be enough. *Id.* See, also, Buford v. McKee, 1 Dana, 107.

⁵ Caldwell v. Williams, 1 Bailey's Eq. 175.

⁶ Haines v. Haines, 6 Maryl. 444; McIntire v. Hughes, 4 Bibb, 186; Mahan v. Mahan, 7 B. Mon. 579; Bright v. Bright, 8 *Id.* 197. Perry on Trusts, § 109.

⁷ "Courts of equity maintain a concurrent jurisdiction in all cases of such donations, where the remedy at law is not adequate or complete. But in such cases the jurisdiction stands on general grounds, and not upon any notion that a *donatio mortis causa* is, from its own nature, properly cognizable therein." Story's Equity Jurisp., § 636. See upon the general subject of these donations, Ward v. Turner, 1 Lead. Cas. Eq. 721, and notes.

⁸ *Post*, Part iii., chap. on Creditors' Bills and Administration Suits.

guage is necessary to create a trust. Certain words, it is true, are considered apt words for that purpose, and are generally used in all carefully prepared instruments by which a disposition of property, either *inter vivos* or after death, is effected; but, nevertheless, if the expressions used sufficiently indicate an intention to create a trust, they will be construed to have that effect, although the technical words, most proper to accomplish the object in view, have not been employed.

This is especially so in the case of wills. The intention of the testator has always been regarded as the pole star by which any construction of the testamentary instrument is to be guided. To ascertain the intention is the aim of all well-directed attempts at interpretation. Whenever, therefore, it appears from the language of the will that it was the intention of the testator to create a trust, the courts will give effect to that intention, in whatever words it may be expressed.

The expressions used by testators for the purpose of creating a trust are, of course, almost infinite in variety, but many of them have been grouped into a certain class of expressions which have been characterized by judges and authors under one general denomination—that, namely, of “Precatory Words.” This term (precatory words) includes words of expectation, request, desire, and recommendation; and the rule on this subject may be stated in general language to be, that wherever property is given by will to one person coupled with expressions of expectation, request, desire, or recommendation that he will use or dispose of the same for the benefit of another, the donee will be considered a trustee of the property for the purposes indicated by the testator, unless it appears from other expressions in the will that the application or non-application of the subject to the designated object was intended to be left to the option of the donee. Thus, to take the simplest case: “if a testator gives £1000 to A. B., desiring, wishing, recommending, or hoping that A. B. will, at his death, give the same sum or any certain part of it to C. D., it is considered that C. D. is an object of the testator’s bounty, and that A. B. is a trustee for him.”¹ So in an early case the words of the will were: “I give to my brother,

¹ Per Lord Langdale, M. R., in *Knight v. Knight*, 11 Cl. & F. 513.
See *Knight*, 3 Beav. 173. See S. C. in

Robert Mason, £2000, which I *desire* him at his death to give to his son and his children, and to the children of his late daughter, as he should think fit." Robert Mason died in the lifetime of the testator, after whose death the children of Robert and his daughter were held entitled to the £2000 in equal shares.¹

And so, in a modern case, where a woman left her husband the use and income of an estate for his life, "in the full confidence that he will, as he has heretofore done, continue to give and afford my children such protection, comfort, and support as they or either of them may stand in need of," it was held that a trust was created for the benefit of her children which was capable of being ascertained and enforced.² The same general rule on this subject exists in most, if not all, of the United States.

72. The doctrine of the creation of trusts by precatory words has not been invariably regarded with favor in England,³ and in many cases a disposition has been evinced to qualify it or apply it very guardedly.⁴ But it must, nevertheless, be considered the well-settled doctrine of the court of chancery that a testamentary gift, accompanied by words of entreaty or recommendation, or expressing a wish or confidence, will be construed as creating an absolute trust, which the first taker of the gift will not be permitted to defeat.⁵

This doctrine has been followed in many of the United States, and its wisdom and soundness have been very ably vindicated.⁶

¹ *Mason v. Limbury*, cited in *Vernon v. Constable v. Bull*, 3 De G. & Sm. 411; *Vernon, Ambler*, 4. *Irvine v. Sullivan*, L. R., 8 Eq. 673.

² *Warner v. Bates*, 98 Mass. 274.

³ See *Sale v. Moore*, 1 Sim. 540; *Reid v. Atkinson*, 5 Ir. R. Eq. 373.

⁴ *Briggs v. Penny*, 3 MacN. & G. 546; *Johnston v. Rowlands*, 2 De G. & Sm. 356; *Webb v. Wools*, 2 Sim. N. S. 267; *Reeves v. Baker*, 18 Beav. 372; *Hood v. Oglander*, 34 L. J. Ch. 528; and *McCormick v. Grogan*, L. R., 4 H. L. Cas. 82.

⁵ *Eaton v. Watts*, L. R., 4 Eq. 155; *Bernard v. Minshull*, Johnson, 276; *Shovelton v. Shovelton*, 32 Beav. 143; *Gully v. Cregoe*, 24 *Id.* 185; *Ward v. Grey*, 26 *Id.* 485; *Proby v. Landor*, 28 *Id.* 504; *Brooks's Will*, 34 L. J. Ch. 616;

⁶ *Warner v. Bates*, 98 Mass. 274;

Harrison v. Harrison, 2 Grattan, 1; *Reid's Admr. v. Blackstone*, 14 Grattan, 363 (though see *Crump v. Redd's Admr.*, 6 *Id.* 372); *Bull v. Bull*, 8 Conn. 47; *Dresser v. Dresser*, 46 Maine, 48; *Erickson v. Willard*, 1 N. Hamp. 217; *Lucas v. Lockhart*, 10 Sm. & Marsh. 466; *Collins v. Carlisle*, 7 B. Mon. 14; *McRee's Admr. v. Means*, 34 Alab. 349; though see *Ellis v. Ellis*, 15 Alab. 296. See also *Lines v. Darden*, 5 Florida, 51, where the general doctrine was recognized, although the circumstances of the case under consideration forbade its application.

In Connecticut and Pennsylvania, however, the rule under consideration seems to have been regarded with some disfavor. In the former State the earlier decision of *Bull v. Bull* was disapproved in the more recent case of *Gilbert v. Chapin*;¹ while in the latter, in *Pennock's Estate*,² the conclusions reached by the court were, that "words in a will, expressive of desire, recommendation, and confidence, are not words of technical, but of common parlance, and are not *prima facie* sufficient to convert a devise or bequest into a trust; and the old Roman and English rule on this subject is not part of the common law of Pennsylvania;" and that "such words may amount to a declaration of trust, when it appears, from other parts of the will, that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice, or discretion." The general English doctrine upon the subject was, however, recognized in the later case of *Burt v. Herron*.³

73. It is, of course, almost impossible to state, with certainty, what particular precatory words will or will not, in any case, create a trust; for they are, in most instances, so interwoven with other expressions, that the effect to be given to them must depend very much upon the language of the particular instrument under consideration. The following expressions, however, have been held effective in fastening the character of a trust upon what would otherwise have been an absolute gift: "desire,"⁴ "recommend,"⁵ "not doubting,"⁶ "in the fullest confidence,"⁷ "wish and will,"⁸ "allow,"⁹ "hope,"¹⁰ "entreat,"¹¹ and, in general,

¹ 19 Conn. 351.

² 8 Harris (Pa.), 268-280. See also *Paisley's Appeal*, 20 P. F. Sm. 153.

³ 16 P. F. Sm. 400.

⁴ *Cruwys v. Colman*, 9 Vesey, 319; *Mason v. Limbury* (*supra*); *Erickson v. Willard*, 1 N. Hamp. 217.

⁵ *Malim v. Keighley*, 2 Vesey, Jr., 333, 529; *Pierson v. Garnet*, 2 Bro. C. C. 38, overruling *Cunliffe v. Cunliffe*, Ambler, 686 (although this last decision is said in *Malim v. Keighley*, 2 Vesey, Jr., 532, to have turned on the nature of the subject-matter of the devise); *Tibbits v. Tibbits*, 19 Vesey, 664; *Horwood v. West*, 1 Sim. & Stu. 387; *Ford v. Fowler*, 3 Beav. 146.

⁶ *Massey v. Sherman*, Ambler, 520; *Parsons v. Baker*, 18 Vesey, 476.

⁷ *Wright v. Atkyns*, 17 Vesey, 255; 19 *Id.* 299; T. & R. 145; and see *Warner v. Bates*, 98 Mass. 274; *Harrison v. Harrison's Admr.*, 2 Grattan, 1; *Bull v. Bull*, 8 Connecticut, 47; *Dresser v. Dresser*, 46 Maine, 48; *Shovelton v. Shovelton*, 32 Beav. 143.

⁸ *McRee's Admr. v. Means*, 34 Alab. 349.

⁹ *Hunter v. Stemberge*, 12 Geo. 192.

¹⁰ *Harland v. Trigg*, 1 Bro. C. C. 144.

¹¹ *Prevost v. Clarke*, 2 Mad. 458; *Taylor v. George*, 2 V. & B. 378.

any words which indicate a desire that the donee should not take beneficially, but should be merely an instrument to distribute the testator's bounty to others.¹

From the decisions upon this subject, and from the principles upon which the general law of trusts is based, certain rules may be derived by which the construction of instruments containing precatory expressions is to be governed. The question in all cases is whether a trust was or was not intended to be created, or, in other words, whether the testator designed to leave the application or non-application of the subject-matter of the bequest to the designated object entirely to the discretion of the donee, or whether his meaning was that his language should be deemed imperative, and that such discretion should be excluded. This is usually considered, by the best authorities, to depend upon three things: *first*, upon the general terms of the will; *secondly*, upon the certainty of the subject-matter; and *thirdly*, upon certainty of the object.²

74. *First.* Precatory expressions ought, *prima facie*, to be considered as imperative and to exclude discretion; the wish of a testator, no matter how expressed, if expressed clearly, should be regarded as a command. This is the opinion of Lord Redesdale in *Carry v. Carry*;³ and although the dicta in some subsequent cases⁴ would seem to be in favor of giving a less decided effect to words of recommendation or request, yet it is conceived that the above statement of the rule is justified by the best considered decisions both in England and in this country.⁵ It is seldom, indeed, that expressions of this nature are found standing alone, and not strengthened, or qualified, or controlled by the context, but when they *do* stand alone they ought to be considered as imposing an obligation, and not merely as constituting a request which the person to whom it is addressed is at liberty to disregard. The reason is obvious. A will, in its very nature, is the

¹ See *Harding v. Glyn*, 2 Lead. Cas. 513; *Williams v. Williams*, 1 Sim. N. S. Eq. 950 (4th Eng. ed.) and notes. 358.

² *Briggs v. Penny*, 3 MacN. & G. 546; ⁵ *Bernard v. Minshull*, Johns. 276; *Lines v. Darden*, 5 Florida, 51; notes to *Shovelton v. Shovelton*, 32 Beav. 143; *Harding v. Glyn*, 2 Lead. Cas. Eq., *ut sup.* *Warner v. Bates*, 98 Mass. 274; *Hawkins on Wills*, 160.

³ 2 Scho. & Lef. 189.

⁴ See *Knight v. Boughton*, 11 Cl. & F.

disposition which the testator desires to have made of his estate after his death. All expressions in it indicative of his wish or will are commands.¹ As a matter of course, the *primâ facies* of a trust, established by the use of precatory words, is liable to be rebutted by any other expressions which indicate an intention on the part of the testator that they should not be taken in an imperative sense; in other words, this particular canon of construction, now under consideration, is, like all others, subordinate to the general rule that the *intention* of the testator as gathered from the whole will is to govern.²

It is to be observed here, that mere discretion as to the distribution of the subject-matter of the bequest among the designated objects, or a discretion as to the selection of a recipient of the testator's bounty out of a particular class, will not detract from the imperative character of precatory expressions, and the donee will be considered as a trustee with a power of distribution or selection.³

75. *Secondly.* The determination of the question whether or not discretion has been excluded, often depends upon the degree of certainty with which the objects of the supposed bounty are pointed out. If, for example, a gift is bestowed coupled with a suggestion or recommendation that it be applied by the donee to objects which are vaguely and imperfectly described, this vagueness will be regarded by the court as tending to show that the application or non-application of the gift was to be left to the option of the donee. It is true, indeed, that certainty is required in all trusts, no matter how they may be created. "To constitute a valid trust," said Sir William Grant, M. R., in *Cruwys v. Colman*,⁴ "undoubtedly three circumstances must concur: sufficient words to raise it, a definite subject, and a certain or ascertained object." There is, however, this difference between trusts created by technical words and those raised by expressions of recommendation and request. In the former, if

¹ *Burt v. Herron*, 16 P. F. Smith, 402.

² *Shovelton v. Shovelton*, 32 Beav. 143;

³ *Eaton v. Watts*, L. R. 4 Eq. 151, 155;

Harding v. Glyn, 1 Atk. 469; 2 Lead.

Young v. Martin, 2 Y. & C. 582; *Brunson*

Cas. Eq. 950 (4th Eng. ed.).

v. King, 2 Hill. Ch. 490; *Van Amee v.*

⁴ 9 Vesey, 323.

Jackson, 35 Vt. 177; *Negroes Chase et*

al. v. Plummer, 17 Md. 165.

the trust fail for want of certainty in the objects, the trustee will not hold beneficially, but there will be a resulting trust in favor of the donor or his estate; in the latter this uncertainty will, in many instances, take away entirely from the gift its fiduciary character, and cause it to vest beneficially in the donee. In one case a trust is created, but fails for want of certainty in its objects; in the other the want of certainty is *evidence* to show that the donor had never intended to create a trust. "Wherever," says the Lord Chancellor, in *Morice v. The Bishop of Durham*,¹ "the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in a will not expressly creating a trust, the indefinite nature and quantum of the subject, and the indefinite nature of the objects are always used by the court as *evidence* that the mind of the testator was not to create a trust;" and this rule has been acted upon in many cases.² But, although uncertainty in the objects is *evidence* to show that a trust was not intended, it is by no means *conclusive* evidence; for if the precatory words are strong, and not qualified by other expressions, the legatee or devisee will not take beneficially, although the trust should fail for want of certainty in the object; and still more so will this be the case, if other provisions in the will indicate the intention of the testator to be that the donee should take only as a trustee.³

76. *Thirdly*. The certainty with which the subject of the bequest or devise is described must also be taken into consideration. It very often happens that a testator gives property to one person with a request or hope that after the decease of the first taker the "surplus" (describing it by this or some other uncertain word) shall be distributed among some designated objects. It has been held that such terms indicate a desire on the part of the testator that the first taker should have absolute control over the property, and that its ultimate disposition should depend

¹ 10 Vesey, 536.

² *Harland v. Trigg*, 1 Bro. C. C. 141; *Meredith v. Heneage*, 1 Sim. 542; *Harper v. Phelps*, 21 Conn. 259; *Hood v. Oglander*, 34 L. J. Ch. 528; *Tolson v. Tolson*, 10 G. & J. 159.

³ *Bernard v. Minshull*, Johns. 276; *In-*

gram v. Fraley, 29 Ga. 553; Hill on Trustees, 110 (4th Am. ed.), notes. The rule laid down in *Briggs v. Penny*, 3 MacN. & G. 546, on this subject has not met with entire approval. See Hawkins on Wills, 160.

entirely upon his discretion.¹ But any words which point out clearly what the property is to which the trust is intended to apply will be sufficient, no matter how untechnical and unartificial they may be.²

It may, perhaps, be doubted whether this doctrine of precatory trusts should be extended to conveyances *inter vivos*. It was, nevertheless, so extended in *Liddard v. Liddard*,³ by the Master of the Rolls, Lord Romilly.

77. It sometimes happens that a trust is created, of which the subject is not strictly speaking property, but only a power or authority to dispose of property. A power is usually defined to be an authority whereby a person is enabled to dispose of an interest vested either in himself or in another. The exercise of these powers, in most instances, depends upon the discretion of the donee of the power, and no person can take by virtue of the power unless the donee thereof chooses to exercise this discretion. But there are also powers which partake of the nature of trusts. "There are not only a mere trust and a mere power," said Lord Eldon in *Brown v. Higgs*⁴ (which is the leading authority upon the subject of powers in trust), "but there is also known to this court a power which the party to whom it is given is entrusted and required to execute; and with regard to that species of power the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed upon him does not discharge it, the court will to a certain extent discharge the duty in his own room and place."⁵ This rule has been followed both in England and in the United States.⁶ If the donee of a power in trust chooses to exercise

¹ *Knight v. Boughton*, 11 Clark & F. 513; *Pennock's Estate*, 8 Harris, 268; *Cowman v. Harrison*, 10 Hare, 234; *Palmer v. Simmonds*, 2 Drew, 221; *Smith v. Bell*, Mart. & Yerg. 302; *Constable v. Bull*, 3 De G. & Sm. 411; *Hill on Trustees*, 119 (4th Am. ed.). See the rules upon the subject of precatory trusts stated in *Hill on Trustees*, 73 (4th Am. ed.), and approved in *Perry on Trusts*, § 114, note.

² *Cruwys v. Colman*, 9 Ves. 319; *Hill on Trustees*, 74.

³ 28 Beav. 266.

⁴ 8 Vesey, 570; 4 Vesey, 708; 5 Vesey, 495.

⁵ See, also, *Harding v. Glyn*, 1 Atk. 469; *Cole v. Wade*, 16 Vesey, 42.

⁶ *Brown v. Pocock*, 6 Sim. 257; *Croft v. Adam*, 12 Sim. 639; *Salisbury v. Denton*, 3 K. & J. 529; *In re Caplin's will*, 34 L. J. Ch. N. S. 578; *Penny v. Turner*, 2 Phil. 493; *Fordyce v. Bridges*, 2 Phil. 497; *White's Trusts*, Johns. 656; *Withers v. Yeadon*, 1 Rich. Eq. 324; *Collins v. Carlise*, 7 B. Mon. 14; *Gibbs v. Marsh*,

the power, he can select, at his discretion, any one of the designated class. If he makes no selection, a court of chancery will not attempt to exercise any discretion, but will make equal distribution among the parties who constitute the favored class. Thus, in the case of *Salisbury v. Denton*,¹ a testator gave a fund to his widow to be disposed of by her partly to charity, and partly among such relations as she should select. Upon the death of the widow without exercising the power, it was held that the charity was entitled to one moiety of the fund, and that the other should be divided among those entitled under the statute of distributions.

In those cases in which the execution of the power is not to take effect out of an interest conferred upon the donee of the power, the courts have exhibited greater reluctance in favoring the power, than in those cases in which the donee of the power would be entitled beneficially in default of the execution of the power; because in the latter case there would be an intention of the testator to qualify the gift to the donee of the power, which would be defeated, whereas no such intention can be presumed to exist where the donee of the power has no interest in the estate.² However, the tendency of the courts is now towards favoring the objects of the power.³

No trust will be construed to exist where there is nothing to show with certainty in whose favor, or in what shares, a gift was intended.⁴

2 Metcalf, 243; *Miller v. Meetch*, 8 Barr, 417; *Smith v. Bowen*, 35 New York, 83; *Whiting v. Whiting*, 4 Gray, 240; *Chase v. Chase*, 2 Allen, 101; *Perry on Trusts*, § 248, *et seq.*

¹ 3 K. & J. 529.

² *Hill on Trustees*, 68; *Harding v.*

Glyn, 1 Atk. 468; *Brown v. Higgs*, 4 Ves., Jr., 708; S. C., 8 Ves. 561; *Bull v. Vardy*, 1 Ves. 271; 2 Sugd. Pow. 177; *Duke of Marlborough v. Godolphin*, 2 Ves. 61; *Crossling v. Crossling*, 2 Cox, 396.

³ *Hill on Trustees*, 69.

⁴ *In re Eddowes*, 1 Dr. & Sm. 395.

CHAPTER III.

IMPLIED TRUSTS.

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| 78. Implied Trusts of two kinds: Resulting Trusts and Constructive Trusts.
79. Resulting Trusts of four kinds.
80. Purchase-money paid by one; title taken in name of another.
81. Requisites to such a trust.
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83. Parol evidence admissible.
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85. Trusts of this kind abolished in certain States.
86. Purchases by Trustees with trust funds. | 87. Conveyance where trust is not declared or fails.
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94. Trustee cannot purchase at his own sale.
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78. TRUSTS by implication of law may arise either for the purpose of carrying out the presumed intention of the parties, or they may be entirely independent of, or even contrary to, intention. Trusts of the first class are said to *result* by operation or presumption of law from certain acts or relations of parties from which an intention to create a trust is supposed to exist, and they are, therefore, called *Resulting* or *Presumptive* Trusts. Trusts of the second class exist purely by construction of law, without any actual or supposed *intention* that a trust should be created, but merely for the purpose of asserting rights of parties, or of frustrating fraud. They are termed, therefore, *Constructive* Trusts.

79. Resulting trusts may arise in several ways, and may be conveniently divided into the following classes: (1) where a purchaser pays the purchase-money, but takes the title in the name of another; (2) Where a trustee or other fiduciary buys property in his own name, but with trust funds; (3) where the trusts of a conveyance are not declared, or are only partially declared, or fail; and (4) where a conveyance is made without any consideration, and it appears from circumstances that the grantee was not intended to take beneficially.

80. The nature of resulting trusts of the first of the above classes was clearly stated by Lord Chief Baron Eyre in the leading case of *Dyer v. Dyer*,¹ and his language has been approved and followed both in England and in this country. "The result of all the cases," he says, "without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or successive, results to the man who advances the purchase-money." To illustrate the doctrine thus stated, suppose A. advances the purchase-money of an estate, and a conveyance of the legal interest in it is made either to B., or to B. and C., or to A., B., and C. jointly, or to A., B., and C. successively. In all these cases, if B. and C. are strangers, a trust will result in favor of A.²

The reason of this doctrine is, that the man who pays the purchase-money is supposed to, or intends to, become the owner of the property, and the beneficial title follows that supposed intention.

This doctrine is in analogy to the common law rule that where there is a feoffment without consideration, the use will result to the feoffor.³

It applies to both realty and personalty;⁴ and trusts of this

¹ 2 Cox, 92; 1 Lead. Cas. Eq. 165; 203 (4th Eng. ed.). See *Buck v. Pike*, 2 Fairfield, 9; *Page v. Page*, 8 N. Hamp. 187; *Pinney v. Fellows*, 15 Verm. 525; *Clark v. Clark*, 43 Id. 685; *Boyd v. McLean*, 1 J. C. R. 582; *Buffalo, etc., R. R. Co. v. Lampson*, 47 Barb. 533; *De Peyster v. Gould*, 2 Green, Ch. 480; *Stratton v. Dialogue*, 1 C. E. Green, 70; *Jackman v. Ringland*, 4 Watts & Serg. 149; *Hollis v. Hayes*, 1 Maryl. Ch. 479; *Newell v. Morgan*, 2 Haring. 229; *Cecil Bank v. Snively*, 23 Maryl. 261; *Bank of United States v. Carrington*, 7 Leigh, 566; *Powell v. Powell*, 1 Freem. Ch. 134; *Thomas v. Walker*, 6 Humph. 93; *Butler v. Rutledge*, 2 Coldwell, 4; *Perry v. Head*, 1 A. K. Marsh. 47; *Snelling v. Utterback*, 1 Bibb,

609; *Martin v. Martin*, 5 Bush, 54; *Gass v. Gass*, 1 Heisk. 613; *Sandford v. Weeden*, 2 Id. 71; *Elliott v. Armstrong*, 2 Blackf. 198; *Paul v. Chouteau*, 14 Missouri, 580; *Tarpley v. Poage's Admr.*, 2 Tex. 150; *Smith v. Boquet*, 27 Tex. 507; *Robinson v. Robinson*, 22 Iowa, 427; *Kane Co. v. Herrington*, 50 Ill. 232. *Perry on Trusts*, 98, § 126; 2 Sug. V. & P. 701 (8th Am. ed.).

² 1 Lead. Cas. in Eq. 173.

³ Per Eyre, C. B., in *Dyer v. Dyer*.

⁴ But not, it is said, to perishable property; *Union Bank v. Baker*, 8 Hump. 447; *Perry on Trusts*, § 130; nor to a mere claim to property; *Mandeville v. Solomon*, 33 Cal. 38.

nature are expressly excepted out of the statute of frauds.¹ Where, however, an agent buys land for his principal, and not only takes the conveyance in his own name, but also pays the price out of *his own funds*, no resulting trust will arise, and the case will fall within the statute of frauds, because in such a case there is no payment of the purchase-money upon which the right of the principal can rest, but that right is dependent solely upon the verbal promise of the agent.² Where no money is advanced, and there is nothing more in the transaction than is implied from the violation of a parol agreement, equity will not decree the purchaser a trustee.³ A resulting trust of this kind must arise, if at all, from the payment of the purchase-money, at the time of the conveyance.⁴ If an express agreement is relied upon, it necessarily excludes the idea of any trust arising purely by implication of law. Such a trust will, therefore, be an express trust, and will fall directly within the statute of frauds.⁵

81. The person in whose favor a trust is claimed to result must pay the purchase-money *as his own*; if he merely advances it as a loan, no trust will result.⁶

¹ 29 Car. II., c. 3, § 8. In *Hoxie v. Carr*, 1 Sum. 187, it was said, by Judge Story, that the exception of resulting trusts from the statute of frauds was merely in affirmance of the general law; and that, therefore, in Rhode Island, where the exception did not exist, the rule was the same as in England. This was followed in *McGuire v. Ramsay*, 4 Eng. (Ark.) 525.

² *Bartlett v. Pickersgill*, 1 Eden, 515; 1 Cox, 15; *Dorsey v. Clark*, 4 Har. & J. 557; *Jackman v. Ringland*, 4 W. & S. 149; *Hill on Trustees*, 96; *Perry on Trusts*, § 135; *Sugden, V. and P.* 703. See, also, *Taliaferro v. Taliaferro*, 6 Alab. 404; *Skillman v. Skillman*, 2 McCart. 478; *Homer v. Homer*, 107 Mass. 82. In *Heard v. Pilley*, L. R. 4 Ch. App. 548, some doubts are expressed as to the correctness of the decision in *Bartlett v. Pickersgill*. In *Follansbe v. Kilbreth*, 17 Ill. 522, and *Chastain v. Smith*, 30 Geor-

gia, 96, it was held that the trust could be enforced.

³ *Williard v. Williard*, 6 P. F. Sm. 125.

⁴ See *Gerry v. Stimson*, 60 Maine, 189, and *Roberts v. Ware*, 40 Cal. 637.

⁵ 1 Lead. Cas. Eq. 216 (4th Eng. ed.); *Gibson v. Foote*, 40 Missis. 792; *Sheldon v. Harding*, 44 Ill. 68; *Lowry v. McGee*, 3 Head, 274; *Farnham v. Clements*, 51 Maine, 426; *Kingsbury v. Burnside*, 58 Ill. 328; though see *Harrold v. Lane*, 3 P. F. Sm. 268; *Cohn v. Chapman*, Phillips (N. C.) Eq. 92; and *Barnard v. Bougard*, Harring. Ch. 143.

⁶ *Bartlett v. Pickersgill* (*supra*); *Aveling v. Knipe*, 19 Ves. 445; *Wheeler v. Kirtland*, 8 C. E. Green, 22; *Milliken v. Ham*, 36 Ind. 166; *Six v. Shaner*, 26 Maryl. 444; *Gibson v. Foote*, 40 Miss. 788. When a purchase is made on the credit of two, and the money is paid by one only, there will be no resulting trust; *Brooks v. Fowle*, 14 N. Hamp. 248.

If the purchase-money is paid by several, and the title taken in the name of one, a trust will result to the others in proportion to the amount paid by each.¹ But to create a resulting trust in such a case, the payment must be of *some definite part* of the purchase-money.² In some cases it has been held that where there is no evidence as to the amount advanced by each party, the presumption will arise that they have furnished the purchase-money in equal proportions.³ In England the presumption seems to be that when money is advanced in equal proportions, a joint tenancy is supposed to have been contemplated with equal chance of survivorship to all; but as survivorship has been removed as an incident to joint tenancy in most of the States of the Union, such a presumption would not probably arise in America.⁴

It is said in Sugden on Vendors, that where two agree to buy land, and the title is taken in the name of both, but one pays the whole consideration, no trust will result in his favor, but he will only have a right of contribution.⁵

82. The language of the statute of frauds upon the subject of resulting trusts is, that, "where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by implication or construction of law, or be transferred or extinguished by act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if the statute had not been made."⁶ It will be observed that the statute speaks of "*any conveyance . . . by which a trust shall arise.*" It has accordingly been held that a resulting trust cannot arise unless some transmission of title has taken place. Thus in a Minnesota

¹ Botsford v. Burr, 2 J. C. R. 410; Union Col. v. Wheeler, 59 Barb. 585; ring. Ch. 143, and Coppage v. Barnett, 34 Miss. 621.

Pierce v. Pierce, 7 B. Mon. 433; Honore v. Hutchings, 8 Bush, 693; Shoemaker v. Smith, 11 Hump. 81; Purdy v. Purdy, 3 Maryl. Ch. 547; Seaman v. Cook, 14 Ill. 501; Latham v. Henderson, 47 Id. 185; Morey v. Herrick, 6 Harris (Pa.) 129; Tibbetts v. Tilton, 11 Foster, 273; Case v. Coddington, 38 Cal. 193; Hill on Trustees (4th Am. ed.), 149; Perry on Trusts, § 132; Sugden V. & P. 701 (8th Am. ed.). Though a contrary doctrine seems to have been held in Barnard v. Bougard, Har-

² Baker v. Vining, 30 Maine, 127; Dudley v. Bachelder, 53 Id. 408; McGowan v. McGowan, 14 Grey, 119; Wheeler v. Kirtland, 8 C. E. Green, 22; Sayre v. Townsends, 15 Wend. 647; Reynolds v. Morris, 17 Ohio St. (N. S.) 510.

³ Shoemaker v. Smith, 11 Hump. 81; Edwards v. Edwards, 3 Wright (Pa.) 386.

⁴ Hill on Trustees, 93; Adams, Eq. 34.

⁵ Sugden V. and P. 700 (8th Am. ed.).

⁶ Stat. 29 Car. II., c. 3, § 8.

case, where the statute abolishing resulting trusts, nevertheless preserves them in favor of the existing creditors of the person paying the consideration, it was held that no trust would result where there has been no actual conveyance by the person from whom the debtor had purchased.¹

It is also essential to a resulting trust that the money should be paid at the time of the purchase; a subsequent payment cannot raise a trust.²

Resulting trusts will not arise against the positive provisions of a statute, or in contravention of public policy. Thus, it has been decided, under the English registration acts, that the doctrine is not applicable to the case of a vessel purchased and paid for by one man, but registered in the name of another.³ And so, too, a resulting trust cannot be enforced by an alien in opposition to statutes, forbidding or circumscribing his right to hold property.⁴

And if the title to property is taken in the name of a third party for the purpose of defrauding the creditor of the party who pays the purchase-money, equity will not assist him in enforcing a resulting trust, for to do so would be to aid a fraud.⁵

The interest of the real purchaser, however, will be subject to the claims of his creditors.⁶

83. It must be remembered that the trusts now under consideration rest upon *presumption* merely, and that this presumption is not one *juris et de jure*, but is one of fact merely, and open to rebuttal. All the facts and circumstances attendant upon the transaction may be proved for the purpose of showing what the intention of the parties really was;⁷ as that the nominal pur-

¹ *Durfee v. Pavitt*, 14 Minn. 430. See also *Jackson v. Morse*, 16 Johns. R. 197; *Green v. Drummond*, 31 Maryl. 81.

² *Foster v. The Trustees*, 3 Alab. 302; *Mahorner v. Harrison*, 13 Sm. & Marsh. 53; *Barnard v. Jewett*, 97 Mass. 87; *Cutler v. Tuttle*, 4 C. E. Green, 549; *Tunnard v. Littell*, 8 *Id.* 267; *Capers v. McCaa*, 41 Miss. 488; *Frederick v. Haas*, 5 Nev. 389; *Bostford v. Barr*, 2 J. C. R. 408; *Nixon's Appeal*, 13 P. F. Sm. 282; *Purdy v. Purdy*, 3 Maryl. Ch. 547; *Perry on Trusts*, § 133.

³ *Hill on Trustees*, 93, 94.

⁴ *Leggett v. Dubois*, 5 Paige, 114; *Hubbard v. Goodwin*, 3 Leigh, 492; *Perry on Trusts*, § 131; *Sugden, V. and P.* 701.

⁵ *Ford v. Lewis*, 10 B. Mon. 127; *Proseus v. McIntyre*, 5 Barb. 425; *Baldwin v. Campfield*, 4 Hals. Ch. 891.

⁶ *Guthrie v. Gardner*, 19 Wend. 414; *Kimmel v. McRight*, 2 Barr, 38; *Hill on Trustees*, 164 (4th Amer. ed.).

⁷ *Byers v. Danley*, 27 Ark. 88.

chaser was the real beneficiary, that the pretended owner was of such mean circumstances as to make it impossible for him to have been the purchaser,¹ that the purchase-money was advanced by the party paying it as a loan to the party in whose name the legal title was taken, and not for the purpose of acquiring the ownership himself, and the like. Hence it is well settled that parol evidence is admissible both to create and to rebut the presumption of a resulting trust.² Parol evidence is admissible to establish a trust in contradiction of the terms of a deed;³ and even (it is now held) after the death of the nominal purchaser.⁴

Parol evidence is also admissible against the answer of the nominal purchaser, although the testimony to establish a trust in such a case must be very strong.⁵

To establish a trust by parol, the evidence must be full, clear, and convincing;⁶ though the application of this rule will, of course, be modified by circumstances.⁷

84. An exception to the general doctrine of resulting trusts occurs in the case of advancements.

Advancement is a term which has, in law, several meanings.

¹ *Willis v. Willis*, 2 Atk. 71; Sug. V. and P. 702 (8th Am. ed.); *Farrell v. Lloyd*, 19 P. F. Sm. 247; though see *Balbec v. Donaldson*, 2 Gr. Cas. 459.

² *Boyd v. McLean*, 1 Johns. C. R. 582; *Kendall v. Mann*, 11 Allen, 15; *Blodgett v. Hildredth*, 103 Mass. 487; *DePeyster v. Gould*, 2 Green Ch. 480; *Swinburne v. Swinburne*, 38 N. Y. 568; *Jackman v. Ringland*, 4 Watts & Serg. 149; *Hollis v. Hayes*, 1 Maryl. Ch. 479; *Dryden v. Hanway*, 31 Maryl. 254; *Bank of United States v. Carrington*, 7 Leigh, 566; *McGuire v. McGowen*, 4 Dess. 486; *Letcher v. Letcher*, 4 J. J. Marsh. 593; *Faris v. Dunn*, 7 Bush, 276; *Creed v. Lancaster Bank*, 1 Ohio St. (N. S.) 1; *Lewis v. White*, 16 *Id.* 444; *Elliott v. Armstrong*, 2 Blackf. 198; *Sandford v. Weeden*, 2 Heisk. 71.

³ *Buck v. Pike*, 2 Fairfield, 9; *Page v. Page*, 8 N. Hamp. 187; *Pinney v. Fellows*, 15 Verm. 525; *Peabody v. Tarbell*, 2 Cush. 232.

⁴ *Boyd v. McLean*, 1 J. C. R. 582;

McCammon v. Pettitt, 3 Sneed, 242; *Fausler v. Jones*, 7 Ind. 277; *Williams v. Hollingsworth*, 1 Strob. Eq. 103; *Perry on Trusts*, § 138.

⁵ *Boyd v. McLean*, 1 J. C. R. 582; *Page v. Page*, 8 N. Hamp. 187; *Moore v. Moore*, 38 *Id.* 382. *Hill on Trustees* (4th ed.), 133.

⁶ *Baker v. Vining*, 30 Maine, 127; *Boyd v. McLean*, 1 J. C. R. 582; *Lloyd v. Lynch*, 4 Casey, 419; *Farrell v. Lloyd*, 19 P. F. Sm. 247; *McGinity v. McGinity*, 13 P. F. Sm. 39; *Jenison v. Graves*, 2 Blackf. 440; *Holder v. Nunnely*, 2 Cold. 288; *White v. Sheldon*, 4 Nevada, 280; *Frederick v. Haas*, 5 *Id.* 389; *Greer v. Baughman*, 13 Maryl. 257; *Phelps v. Seely*, 22 Grat. 589; *Kendall v. Mann*, 11 Allen, 15; *Olive v. Dougherty*, 3 Iowa, 371; *Miller v. Stokely*, 5 Ohio St. (N. S.) 194; *Johnson v. Quarles*, 5 Post (Mis.), 423; *Tunnard v. Littell*, 8 C. E. Green, 267; *Parmlee v. Sloan*, 37 Ind. 482.

⁷ *Snell v. Elam*, 2 Heisk. 82.

Its signification in the present connection is a gift from a parent to a child, which is supposed to be intended when the purchase-money is paid by the parent, and the conveyance is taken in the name of the child. The ordinary presumption of a resulting trust, already described, is in such a case rebutted by the supposed intention to benefit the child; and instead of the latter holding as trustee for the parent, he will be construed to take beneficially by advancement.¹ *Dyer v. Dyer*, already cited,² is an authority upon this particular branch of the law of resulting trusts. In that case copyhold premises were granted to Simon Dyer, and Mary his wife, and his son William, to take in succession for their lives, and to the longest liver of them, the purchase-money having been paid by the father. The wife died, and then the father, leaving surviving him William and another son, to whom he had devised the copyhold estate. Upon a bill filed by this younger son against his brother William, it was held that the latter could not be treated as a trustee of the legal title for the benefit of his father's devisee, but that he took beneficially by way of advancement; and the bill was dismissed.

The doctrine of advancement is firmly established in the United States as well as in England; and the general rule may be stated to be that a purchase in the name of a child will be regarded *primâ facie* as an advancement, and not as a resulting trust for the father.³ The rule applies to other relations than those of father and child. A purchase by any one in the name of another to whom the purchaser stands in *loco parentis* will be treated as an advancement. Thus the rule has been held to apply to grandfather and grandchild;⁴ to mother and daughter;⁵

¹ As the general doctrine of resulting trusts is analogous to the common law rule that where there is a feoffment without consideration, the use results to the feoffor; so the exception as to advancements, now under consideration, is in accordance with the legal principle that where there is a feoffment from a father to a son the consideration of blood would settle the use on the son. *Grey v. Grey*, 2 Swans. 598.

² *Ante*, p. 91.

³ *Page v. Page*, 8 N. Hamp. 187; *Denison v. Goehring*, 7 Barr, 180, note;

Taylor v. James, 4 Dess. 1; *Douglass v. Brice*, 4 Rich. Eq. 322; *Astreen v. Flanagan*, 3 Edw. Ch. 279; *Partridge v. Haven*, 10 Paige (Ch.), 618; *Welton v. Divine*, 20 Barb. 9; *Doyle v. Sleeper*, 1 Dana, 536; *Taylor v. Taylor*, 4 Gilm. 303; *Perry on Trusts*, § 143, *et seq.*; *Hill on Trustees*, 97 *et seq.*

⁴ *Ebrand v. Dancer*, 1 Coll. N. C. C. 265 n.

⁵ *Murphy v. Nathans*, 10 Wright (Pa.) 508; *Sayre v. Hughes*, L. R. 5 Eq. 376; though see *In re de Visme*, 2 De G. J. & Sm. 17.

to husband and wife;¹ and to a purchase in the name of a son-in-law.² A purchase in the name of a brother will not be considered an advancement;³ unless the purchaser stands in *loco parentis* towards his brother.⁴

It seems to be doubtful whether a purchase in the name of an illegitimate child is to be treated as an advancement; although the weight of authority is in favor of so treating it.⁵

Where the money is advanced by a son and the title taken in the name of the father, the presumption will be in favor of a resulting trust, and not an advancement.⁶

Whether a purchase made by a father in the *joint* names of himself and son will be considered as an advancement has been a doubtful question; but the more recent authorities are in favor of considering it an advancement.⁷

The presumption of advancement being, as Chief Justice Eyre said in *Dyer v. Dyer*, a mere circumstance of evidence, may be rebutted by other evidence or other presumptions tending to show an intention that the child was to hold as a trustee. Thus the relation of solicitor and client has been held to prevent the presumption of an advancement which would otherwise have arisen.⁸ And where the deed is taken in the name of a wife for the purpose of defrauding the husband's creditors, a trust will result to the husband so as to make the property liable to his debts.⁹

85. It remains to be noticed that resulting trusts of the kind now under discussion have been abolished in certain States of the Union by statute. Such is the case in New York, Michigan, and Wisconsin. So, also, in Massachusetts, Maine, and Indiana.¹⁰

¹ Kline's Appeal, 3 Wright (Pa.), 463. Williams v. Williams, 32 Beav. 370; Sugd.

² Baker v. Leathers, 3 Porter (Ind.), V. and P. 704 (8th Am. ed.).

³ Garrett v. Wilkinson, 2 De G. & Sm.

⁴ Edwards v. Edwards, 3 Wright (Pa.), 244. See, also, Wallace v. Bowers, 28 Verm. 638; Dudley v. Bosworth, 10

⁵ Forrest v. Forrest, 34 L. J. Ch. 428. Hump. 12; Jackson v. Matsdorf, 11

⁶ Beckford v. Beckford, Loft. 490; John. 91; Taylor v. Taylor, 4 Gilm. 303.

⁷ Soar v. Foster, 4 K. & J. 152; Tucker v. Belford v. Crane, 1 C. E. Green, 265; Burrow, 2 Hem. & M. 515. *post*, Part II., Chap. II.

⁸ Howell v. Howell, 2 McCart. 75.

⁹ Grey v. Grey, 2 Swanst. 599; Wil-

¹⁰ See Glidewell v. Spaugh, 26 Ind. 319.

86. The second class of resulting trusts is where a trustee or other fiduciary purchases property with trust funds and takes the title in his own name. In such a case a trust will result by operation of law for the benefit of the trust estate, as the trustee will be presumed to have intended that the purchase should enure to the benefit of the estate. Trust funds may in this way be followed into any property into which they have been invested or converted by the trustee; and this is constantly done by the courts for the benefit and redress of injured *cestuis qui trust*.¹

The rule above stated applies to purchases by a trustee,² by a partner,³ an agent employed to buy,⁴ or trustees of a corporation,⁵ or an executor,⁶ or a committee of a lunatic,⁷ or a guardian,⁸ or a husband purchasing with avails of his wife's separate estate,⁹ or a mortgagor.¹⁰

A resulting trust will also arise when a trustee mixes trust funds with his own, for it will then become the trustee's duty to establish how much of his own money went to the purchase, or the *cestui qui trust* will take the whole. This is in accordance with the usual rule upon the subject of confusion of goods.¹¹ It

¹ Perry on Trusts, § 127.

² Oliver v. Piatt, 3 Howard, 401; Harrisburg Bank v. Tyler, 3 Watts & Serg. 373; Martin v. Greer, 1 Geo. Dec. 118; Moffitt v. McDonald, 11 Hump. 457; Day v. Roth, 18 N. Y. 448; Lathrop v. Gilbert, 2 Stockt. 345; Pugh v. Pugh, 9 Ind. 132.

³ Philips v. Crammond, 2 Wash. C. C. 441; Piatt v. Oliver, 2 McLean, 267; 3 Howard, 401; Coder v. Huling, 3 Casey, 84; Baldwin v. Johnson, Saxt. 441; Edgar v. Donnelly, 2 Munf. 387; Pugh v. Currie, 5 Ala. 446.

⁴ Church v. Sterling, 16 Conn. 388; Eshleman v. Lewis, 13 Wright (Penna.), 410. See, also, Hutchinson v. Hutchinson 4 Dess. 77; Follansbe v. Kilbreth, 17 Ill. 522; Chastain v. Smith, 30 Georgia, 96.

⁵ Methodist Church v. Wood, 5 Hamm. 283.

⁶ Claussen v. La Franz, 1 Clarke, 226; McCrory v. Foster, *Id.* 271; Wallace v.

Duffield, 2 Serg. & Rawle, 521; Harper v. Archer, 28 Miss. 212.

⁷ Reid v. Fitch, 11 Barb. S. C. 399.

⁸ Caplinger v. Stokes, Meigs, 175; Bancroft v. Consen, 13 Allen, 50; Johnson v. Dougherty, 3 C. E. Green, 406; Durling v. Hammar, 5 *Id.* 220; Turner v. Pettigrew, 6 Hump. 438; Shelton v. Lewis, 27 Ark. 190; Schlaefer v. Corson, 52 Barb. 510.

⁹ Methodist Church v. Jaques, 1 John. Ch. 450; 3 *Id.* 77; Fillman v. Divers, 7 Casey, 429; Marsh v. Marsh, 43 Ala. 637; Click v. Click, 1 Heisk. 607; Sandford v. Weeden, 2 *Id.* 71; Miller v. Edwards, 7 Bush, 394; Resor v. Resor, 9 Ind. 347; Barron v. Barron, 24 Verm. 375; Pritchard v. Wallace, 4 Sneed, 405; Wallace v. McCollough, 1 Rich. Eq. 426.

¹⁰ McLarren v. Brewer, 51 Maine, 402.

¹¹ See Hill on Trustees, 148 (4th Am. ed.), note; Frith v. Cartland, 34 L. J. Ch. 301; Pennell v. Doffell, 4 De G. M.

has been doubted, however, whether the *cestui qui trust* in such cases has anything more than a lien on the property to the extent of the money belonging to the trust estate; but the general rule in America is in favor of a resulting trust.¹

87. The third of the classes into which resulting trusts have been divided embraces those cases in which there is a disposition of property upon trust, but no trust is declared, or is only partially declared, or wholly or partially fails. "There is no equitable principle more firmly established than that where a voluntary disposition of property by deed or will is made to a person as trustee, and the trust is not declared at all, or is ineffectually declared, or does not extend to the whole interest given to the trustee, or it fails either wholly or in part by lapse or otherwise; the interest so undisposed of will be held by the trustee, not for his own benefit, but as a resulting trust for the donor himself, or for his heir-at-law or next of kin, according to the nature of his estate."²

The rule above stated applies, it will be observed, to voluntary dispositions and not to those based upon a valuable consideration,³ and it is called into operation in the case of wills more frequently than in deeds. The presumption of a resulting trust is, indeed, stronger in a case of a disposition of property by conveyance *inter vivos*, than in a testamentary disposition, which always implies bounty;⁴ but the limitations of beneficial interests are usually more precise and exhaustive in deeds than in wills, and a case of an interest undisposed of is not, therefore, so likely to arise.

The plainest case of a trust of the kind now attempted to be explained, is that in which a gift is made upon trust but no trusts are declared. Of this a striking example is the case of the Corporation of Gloucester *v.* Wood,⁵ where a testator gave

& G. 372. See, also, *Commonwealth v. McAllister*, 4 Casey, 480; *McAllister v. Commonwealth*, 6 Casey, 536; *School v. Kirwin*, 25 Ill. 13; *Kip v. The Bank of New York*, 10 Johns. 65; *Thompson's Appeal*, 10 Harris (Pa.), 16; *McLarren v. Brewer*, 51 Maine, 402; *Seaman v. Cook*, 14 Ill. 505; *Russel v. Jackson*, 10 Hare, 209.

¹ *Wallace v. Duffield*, 2 Serg & Rawle, 530; *Wallace v. McCollough*, 1 Rich. Eq. 421; *Day v. Roth*, 18 N. Y. 456; *Hill on Trustees*, 148 (4th Am. ed.), note.

² *Hill on Trustees*, 113, 114.

³ *Brown v. Jones*, 1 Atk. 191.

⁴ *Sidney v. Shelley*, 19 Ves. 358.

⁵ 3 Hare, 131; 1 H. L. Cas. 272.

£200,000 to his executors "for the purposes I have before named," but no purposes had been named, and it was held that there was a resulting trust in favor of the residuary legatees.

An insufficient declaration of trust will have the same effect as an entire failure to declare.¹

88. A more difficult question not unfrequently arises in those cases in which the gift is made upon trusts which are effectively declared, but which do not exhaust the entire beneficial interest. Here, if the intention is plain that the donee is not to take the undisposed residue beneficially, there will, of course, be a resulting trust in favor of the next of kin, or the heir-at-law, according to the nature of the property; but the difficult point to determine is whether the donee was intended to take the undisposed interest beneficially. Many authorities exist upon this point, and many fine distinctions have been drawn. In *Barrs v. Fewkes*,² however, the result of the cases is thus stated by the (then) Vice-Chancellor, Wood: 1st, where there is a gift to A. to enable him to do something, where he has a choice whether he will do it or not, then the gift is for his own benefit, the motive why it is given to him being stated; 2d, where you find the gift is for the general purposes of the will, then the person who takes the estate cannot take the surplus, after satisfying the trust, for his own benefit; and, 3d, where a charge is created by the will, the devisee takes the surplus for his own benefit, no trust being implied.

Another instance of the class of resulting trusts now under consideration is that which arises out of the failure of a gift by lapse. Where, for example, a testator declares a trust in favor of A., and A. dies in the testator's lifetime, the trustee will hold the property for the benefit of the testator's real or personal representatives, according to the nature of the property.³ So too where a gift is void *ab initio* because of its violation of some statutory provision (*e. g.* the statutes against excessive accumu-

¹ Hill on Trustees, 116; *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 522. See, also, *Lomax v. Ripley*, 3 Sm. & Giff. 48; *King v. Mitchell*, 8 Peters, 326; *Shaeffer's Appeal*, 8 Barr, 38. See, however, *Benning v. Benning's Exr.*, 14 B. Mon. 585.

² 2 Hem. & M. 60. See, also, *Ellcock v. Mapp*, 3 H. L. Cas. 492; *King v. Denison*, 1 V. & B. 272; *William v. Roberts*, 4 Jur. N. S. 18; Hill on Trustees, 119.

³ Hill on Trustees, 135, 136.

lations), or for some illegal purpose, the interest which is thus attempted to be illegally created will result for the benefit of the heir or next of kin.¹

A resulting trust of personalty will not, however, arise where there is a residuary clause, because that clause ordinarily includes all interests not disposed of at the time of the testator's death.² Where, however, the interest which fails constitutes or forms a part of the residuary estate, a resulting trust will take place.³

It is sometimes difficult to determine for whose benefit the resulting trust takes effect—that is to say, whether for the heir or next of kin. Thus, where real estate is directed to be sold, and the proceeds applied to certain purposes, and there is a partial failure of purposes for which the sale was designed, a question may arise whether the undisposed surplus will go to the next of kin in its new condition of personalty, or to the heir in accordance with its original state. The general rule now is in England that unless there is a conversion out and out and for all purposes, the heir-at-law will take.⁴ In America, however, the rule is not so strongly in favor of the heir,⁵ and where realty and personalty are mixed in a common fund, and there is a partial failure of a beneficial interest by lapse, the trust which results will enure to the benefit of the personal, and not the real representative of the testator.

89. An exception to the doctrine of resulting trusts of the class now under discussion occurs in the case of a charity. It has already been stated that one of the requisites to the creation of a valid trust is *certainty* in the object to be benefited. If the object of an ordinary trust be not defined with sufficient precision, the gift will fail, and there will, of course, be a resulting trust. But in trusts for charitable uses the rule is otherwise. Uncertainty in the object does not necessarily result in a failure of the gift. Indeed, uncertainty in the object has been said to be a characteristic of a true charitable use.⁶

¹ Johnson v. Clarkson, 3 Rich. Eq. 305; Ford v. Dangerfield, 8 Rich. Eq. 95; Drew v. Wakefield, 54 Maine, 291; Lusk v. Lewis, 32 Miss. 297.

² Woolmer's Est., 3 Whart. 477.

³ Leake v. Robinson, 2 Meriv. 392; Hill on Trustees, 136.

⁴ Ackroyd v. Smithson, 1 Lead. Cas. Eq. 872 (4th Eng. ed.).

⁵ Hill on Trustees, 143. *Post*, chapter on Conversion.

⁶ *Infra*, chapter V.

Therefore, where there is a gift for charitable purposes *generally*, although no particular purpose is declared, or if declared does not exhaust the entire interest, there will be no resulting trust, but this charitable purpose will be carried out by the Court of Chancery.¹

The principle upon which a court of chancery acts in thus carrying out a general charitable intent is what is known in England as the *cy pres* doctrine—in other words, a doctrine by which the charitable disposition will be effected as nearly as may be. This principle has not been as much favored in the United States as in England, and the exception to the general rule as to resulting trusts is therefore not, perhaps, so broad as in England. The subject will be found noticed under the head of Trusts for Charitable Uses.² At present it is sufficient to observe that this exception does exist.

90. The last of the classes into which resulting trusts have been divided is where there is a voluntary conveyance without any consideration, and it appears from circumstances that the grantee was not intended to take beneficially.

According to the ancient doctrine, where a feoffment was made without any consideration, the use resulted to the feoffor; and it was formerly thought that the same rule would apply to voluntary declarations of trust.³ But the true rule now seems to be that where the instrument is perfectly executed and intended to operate at once, no resulting trust for the grantor will arise from the mere fact that the transaction is a voluntary one, unless there are other circumstances which tend to show that the grantee was not intended to take beneficially.⁴

91. The second general division of implied trusts is that which embraces those known as Constructive Trusts. Constructive trusts are those which arise purely by construction of equity, and are entirely independent of any actual or presumed intention of the parties. Nor have constructive trusts, as they are

¹ Hill on Trustees, 128.

² *Infra*, chap. V.

³ Hill on Trustees, 106.

⁴ *Souverbye v. Arden*, 1 Johns. C. R. 240; *Rathbun v. Rathbun*, 6 Barb. 98; *Philbrook v. Delano*, 29 Maine, 410; *Jackson v. Cleveland*, 15 Mich. 103;

Baldwin v. Campfield, 4 Ha'st. 891;

Hogan v. Jaques, 4 C. E. Green, 126;

Bank of United States v. Housman, 6

Paige, C. R. 526; *Titcomb v. Morrill*, 10

Allen, 15. See, however, *Hogan v. Strayhorn*, 65 N. Carolina, 279.

here considered, any element of fraud in them. Equity, indeed, as we shall see, makes use of the machinery of a trust for the purpose of affording redress in cases of fraud; as when a party has acquired the legal title to property by unfair means, he will be deemed to hold it in trust for the injured party who may call for a conveyance thereof. The party guilty of the fraud is said, in such cases, to be a trustee *ex maleficio*. But, in such cases, the interference of courts of equity is called into play by fraud as a distinct head of jurisdiction; and the complainant's right to relief is based upon that ground, the defendant being treated as a trustee merely for the purpose of working out the equity of the complainant. Cases of this description, therefore, will be considered under the head of Fraud. At present we have to do with those trusts which are, in the truest and most technical sense, constructive—those, namely, which arise by pure implication of equity, and without regard to the intention of parties, or (necessarily) the frustration of fraud.

92. One of the most ordinary trusts of this kind is that which X grows out of the rule of law which forbids a trustee, or any other person who occupies a fiduciary or quasi fiduciary position, from gaining any personal advantage, touching the thing or subject as to which such fiduciary position exists.¹ To use the language of a learned author, "wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated."² The instance usually given of this rule is the renewal of a lease by a trustee in his own name and with his own funds, which renewal will, by the equitable doctrine now under consideration, enure to the benefit of the *cestui qui trust*; and the leading authority upon the subject is the case of *Keech v. Sandford*, otherwise known as the *Rumford Market Case*.³ In that case the trustee applied, in the first instance, for the renewal for the

¹ Hill on Trustees, 159.

² 1 Lead. Cas. in Eq. 36; Sel. Cas. in

³ American note to *Keech v. Sandford*, Ch. 61. See, also, *Mill v. Hill*, 3 H. L. Cas. 828.

1 Lead. Cas. in Eq. 92.

benefit of the beneficiary, who was an infant; but the renewal was refused on the ground that, the subject-matter of the lease being the profits of a market, there could be no distress, and the lessee's remedy must be on the covenant alone, by which the infant could not be bound. The trustee then renewed for himself; and it was held, on bill filed, that he must still be regarded as a trustee of the lease for the benefit of the infant. The general doctrine of this case is well established in the United States.¹

It may be thought that the above example might fall more properly under the head of a resulting trust of the second class,² on the one hand, or under the head of constructive trusts by presumptive fraud on the other. But the instance of a trust just stated differs from a resulting trust of the second class, inasmuch as the renewal of the lease was not made with trust funds, but with the proper money of the trustee; and it differs from a trust by fraud (growing out of the relation of parties) in this that no fraudulent intent is even presumed to exist, but the renewal is forbidden simply on the ground of public policy alone.³

93. The rule under discussion applies not only to persons standing in a direct fiduciary relation towards others—such as trustees, executors, attorneys, and agents, but also to those who occupy any position out of which a similar duty ought in equity and good morals to arise. Thus it will be enforced against partners,⁴ tenants for life,⁵ mortgagees,⁶ a husband,⁷ attorneys-at-

¹ American note to *Keech v. Sandford* (*supra*); *Parkist v. Alexander*, 1 J. C. R. 394; *Holdridge v. Gillespie*, 2 J. C. R. 30; *Green v. Winter*, 1 J. C. R. 26; *Van Horne v. Fonda*, 5 *Id.* 409; *Evertson v. Tappan*, *Id.* 514; *Wilson v. Troup*, 2 Cowen, 195; *Butler v. Hicks*, 11 Sm. & Marsh. 78; *Mathews v. Dragaud*, 3 Dess. 25; *Irwin v. Harris*, 6 Ired. Eq. 221; *Clark v. Cantwell*, 3 Head, 202; *Heager's Exrs.*, 15 S. & R. 65; *Galbraith v. Elder*, 8 Watts, 81; *Huson v. Wallace*, 1 Rich.

Eq. 2; *King v. Cushman*, 41 Ill. 31; *Frank's Appeal*, 9 P. F. Sm. 190.

² *Supra*, page 98.

³ Where no actual fraud exists, the remedy is in equity alone; *Yeackel v. Litchfield*, 13 Allen, 417.

⁴ *Anderson v. Lemon*, 4 Seld. 236.

⁵ *Dickinson v. Codwise*, 1 Sandf. Ch. 227.

⁶ *Hyndman v. Hyndman*, 19 Verm. 9; *Benham v. Rowe*, 2 Cal. 387. See *Woodlee v. Burch*, 48 Mo. 231.

⁷ *Swisshelm's Appeal*, 6 P. F. Sm. 475.

law,¹ and vendees under articles,² in favor of copartners, tenants in remainder, mortgagors, a wife, clients, and vendors, respectively. And these instances must be considered only as illustrations of the principle, and not as an exhaustive catalogue of the parties to whom it will be confined. A purchaser from a trustee, executor, etc., will also be held to the same responsibility if he is either a purchaser without value, or a purchaser with notice of the trust. To be protected he must be a *bonâ fide* purchaser, without notice and for a valuable consideration.³

On the other hand, a vendor of real estate under articles, or a mortgagor, is held to a corresponding duty towards the vendee or mortgagee. Thus it has been held that if a lessee mortgages the leasehold, and afterwards obtains a renewal, the renewal shall enure for the benefit of the mortgagee.⁴ Whether a person who, if he renew at all, is bound to renew for the benefit of another, can purchase the *reversion* for himself, seems to be a doubtful question.⁵

The renewal of leaseholds is only an example of the general principle stated above, viz., that no fiduciary can gain any personal advantage touching the subject of the trust.⁶ The same doctrine is applied to prevent the purchase by persons in such positions of any claims, encumbrances, or outstanding titles. If, therefore, a tenant in common were to purchase an outstanding, adverse title, the acquisition would enure to the benefit of his co-tenants.⁷ In other words, he will be treated as a constructive trustee of the newly acquired title for the benefit of the other owners. And an agent employed to purchase, who takes a conveyance in his own name, will be considered as holding the property in trust for his principal.⁸

94. Akin to the doctrine which has just been noticed is that which forbids trustees or executors from purchasing at their own sales. It has been held in many cases that if trust property

¹ Galbraith v. Elder, 8 Watts, 81.

² Morgan v. Boone, 4 Monroe, 291.

³ Hill on Trustees, 162, 163; Bridgman v. Green, 2 Ves. Sr. 627.

⁴ Smith v. Chichester, 1 Con. & L. 486.

⁵ Randall v. Russell, 3 Meriv. 190.

Though see Britton v. Lewis, 8 Rich. Eq. 271; Eldridge v. Smith, 34 Verm. 484.

⁶ Hill on Trustees, 539(839, 4th Am. ed.).

⁷ Lloyd v. Lynch, 4 Casey, 419.

⁸ Parkist v. Alexander, 1 J. C. R. 394;

Wellford v. Chancellor, 5 Grattan, 39;

Baker v. Whiting, 3 Sumn. 476.

is sold by the trustee even at public sale, he cannot purchase. If he does so, he will still be considered, at the option of the *cestui qui trust*, a trustee by equitable construction.¹

This rule does not proceed on the ground of fraud, but because of public policy.² It is the same policy as that which forbids a sheriff, for instance, from purchasing at a sale under an execution. No fraud may exist in point of fact; no fraud is presumed in law; but public propriety would be outraged if such acts were permitted, and hence their prohibition. When they *do* occur, the wrong inflicted is redressed through the medium of a constructive trust.³

This rule applies not only to those cases in which the trustee or agent for sale buys directly from the beneficiary (in which case, indeed, an element of fraud through undue influence is introduced by which the transaction is vitiated), but also to purchases at public auction, where all the world has a chance to buy; and it makes no difference whether the purchase has been advantageous or not; in either event the *cestui qui trust* or principal, as the case may be, has the right to have it rescinded.⁴ The purchase, however, may be affirmed at the option of the *cestui qui trust*.⁵

It is a disputed point whether the rule applies to sales made adversely to the trust. Thus it has been ruled that if a trust estate is sold under an adverse judgment, it is entirely compe-

¹ See notes to *Fox v. MacKreth*, 1 41 Ala. 375; *Harris v. Parker*, *Id.* 604; *Lead. Cas. Eq.* 92, and *Hill on Trustees*, 248 (4th Am. ed.), and notes. *Scott v. Umbarger*, 41 Cal. 419. See, however, *Birdwell v. Cain*, 1 Cold. 301.

² See *Yeackel v. Litchfield*, 13 Allen, 419.

³ *Hill on Trustees*, 159 (248, 4th Am. ed., and notes); *Michoud v. Girod*, 4 How. 504; *Davoue v. Fanning*, 2 J. C. R. 252; *Leisenring v. Black*, 5 Watts, 303; *Staats v. Bergen*, 2 C. E. Green, 554; *Miles v. Wheeler*, 43 Ill. 123; *Kruse v. Steffens*, 47 *Id.* 112; *Blauvelt v. Ackerman*, 5 C. E. Green, 141; *Grumley v. Webb*, 44 Missouri, 444; *Roberts v. Roberts*, 65 N. C. 27; *Carter v. Thompson*, 41 Ala. 375; *Harris v. Parker*, *Id.* 604; *Scott v. Umbarger*, 41 Cal. 419. See, however, *Birdwell v. Cain*, 1 Cold. 301.

⁴ *Davoue v. Fanning*, 2 John. C. R. 252; *Boerum v. Schenck*, 41 New York, 182; *Washington R. R. v. Alexandria R. R.*, 19 Grat. 592; *Campbell v. McLain*, 1 P. F. Sm. 200; *Ives v. Ashley*, 97 Mass. 198. Even if the trustee buys, not for himself, but for a third party; *North Baltimore Asstn. v. Caldwell*, 25 Maryl. 420.

⁵ *Ives v. Ashley* (*supra*); *Yeackel v. Litchfield*, 13 Allen, 419; *Perry on Trusts*, § 198; *Hill on Trustees*, 249 (4th Am. ed.).

tent for the trustee to bid.¹ The weight of authority, however, is, perhaps, the other way.²

Trustees are very frequently allowed to bid at their own sales, but in so doing their conduct is watched with great jealousy.³

95. A constructive trust will also arise if a person obtains from a trustee the trust property without paying value for it, although without notice of the trust. In such a case he will be held to be a trustee by construction.⁴

A constructive trust may also arise under a contract. Where a contract has been entered into for the sale of an estate, equity, as it looks upon things agreed to be done as actually performed,⁵ considers the vendor as a trustee of the legal title for the purchaser, and the purchaser as a trustee of the purchase-money for the vendor.⁶ The method of enforcing these trusts is by a bill to compel the conveyance of the legal title, or, in other words, a bill for specific performance; and the subject will be considered when that equitable remedy is treated of.⁷ Constructive, like resulting trusts, do not fall within the statute of frauds.

¹ *Fisk v. Sarber*, 6 Watts & Serg. 18; 293; *Dundas's Appeal*, *Id.* 325; *Tennant Chorpenning's Appeal*, 8 Casey, 315; *Hill v. Trenchard*, L. R. 4 Ch. App. 537-547.
on Trustees, 160 (250, 4th Am. ed.).

² *Hill on Trustees*, *ubi supra*; *Perry on Trusts*, § 205.

Cadwalader's Appeal, 14 P. F. Sm.

⁴ *Hill on Trustees*, 172.

⁵ *Ante*, p. 49.

⁶ *Hill on Trustees*, 171.

⁷ *Infra*, Part III., Chap. 1.

CHAPTER IV.

TRUSTS FOR MARRIED WOMEN.

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| 96. Rights of husband at common law in wife's property.
97. Statutory changes.
98. Creation of trusts for sole and separate use.
99. Trustee not necessary.
100. No particular words necessary.
101. Power of married women over separate estate.
102. Liability of separate estate to her engagements; <i>Johnson v. Gallagher</i> .
103. Rules in the United States upon this subject.
104. Restraints on anticipation.
105. For whose benefit separate estates | may be created; <i>Massey v. Parker</i> ; <i>Tullett v. Armstrong</i> .
106. Rules in the United States on this subject.
107. General conclusions; Lewin's propositions.
108. Pin Money trusts.
109. Wife's Equity to a settlement.
110. How enforced.
111. How waived.
112. To what property it attaches.
113. Against whom, and in whose favor.
114. Gifts from husband to wife; contracts.
115. Contracts for separation. |
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96. It is well known that at common law a husband acquired a life estate as tenant by the curtesy of England in his wife's inheritable estates in realty, provided there was issue of the marriage born alive,¹ that he had power to alien her chattels real, and that he also became entitled to her personal property in possession, and to her *choses in action*, provided he reduced them into possession during coverture, or by administration if he survived her.

This was the case not only as to the property of a *feme covert* of which she held the legal title, but also as to that in which she had only an equitable interest. If, for example, a fund were held by a trustee for the benefit of a woman, and she were to marry, her husband would have had the right to demand payment to himself, and his receipt would have been a sufficient discharge.²

¹ In many States of the Union birth of issue is no longer a requisite to tenancy by the curtesy.

² Hill on Trustees, 407; Perry on Trusts, § 626.

This right of the husband was, however, subject to this qualification, viz., that, if, in order to reach the equitable property of the wife, he were obliged to come into the court of chancery, equity would compel him, at her request, to make a suitable provision for herself and her children.¹ This right of the wife was what is known as her equity to a settlement. It grew out of the general maxim that he who seeks the aid of a court of equity must do equity; and was, therefore, at first supposed to be enforceable against the husband, only in those instances wherein he was compelled to resort to the assistance of a chancellor for the purpose of reaching his wife's property. It was, however, decided in *Elibank v. Montolieu* that the benefit of this rule could be claimed by the wife as plaintiff, and this is now the settled law.²

97. The English common law rule existed originally in most of the United States. It has, however, in many, if not all of them, been altered by statute, and the property of married women has been freed from the grasp of the husband's authority, and from liability for his debts and engagements; and the common law rights of the husband in his wife's property have recently been somewhat modified in England by a statute passed in 1870, by which the property of married women is partially secured to them, and trustees may be appointed to take charge of the same on application to the court.³

98. Reasons similar to those which have led to these legislative enactments, had long ago in England induced the Court of Chancery to interpose its extraordinary jurisdiction for the protection of married women, and this object was effected by the creation of what is now so well known as the equitable separate estate of *femes couvertes*—which not only owes its existence to equity, but which is governed, in many particulars, by rules differing from those which are incidental to ordinary legal and equitable estates, and which the courts have found necessary to lay down in order to attain the desired end.

This equitable separate estate may be defined to be an estate created by, and originally recognized only in, courts of equity,

¹ *Elibank v. Montolieu*, 1 Lead. Cas. Eq. 497, and *post*, Sec. 109.

² 33 and 34 Vic., c. 93. See notes to *Hulme v. Tenant*, 1 Lead. Cas. Eq. 481

³ *Elibank v. Montolieu*, 5 Vesey, 737. (4th Eng. ed.).

for the purpose of securing the beneficial enjoyment of property to a woman during coverture—this purpose being effected through the medium of a trust whereby the ordinary marital rights of the husband over his wife's property are excluded, so far as the same are in contravention of the *feme's* enjoyment of her estate.

It will be seen, hereafter, that while the objects which the courts had in view, in creating the equitable separate estate, were to exclude the husband's control, to free the property from liability for his debts, and to secure to the wife its beneficial ownership, yet the decisions upon this subject have not been uniformly successful in accomplishing the desired results.

It may be observed here that while the separate use trust is of an exceptional character,¹ yet it is based upon very broad principles which occasionally manifest themselves in other equitable doctrines as much at variance with the ordinary common law rules as the one now under consideration. Thus it has been pointed out by a learned judge that not unfrequently a strife occurs between the will of the donor and the public policy which forbids restraints upon alienation, or which renders property in which a party has a beneficial interest subject to the grasp of his creditors. Yet it has occurred in many instances that both of these branches of public policy have been, to a certain extent, infringed, because equity has thought it right to allow a donor to make a gift upon such terms, and subject to such restrictions, as he might see fit.²

99. It has been stated already that the object of securing to a wife the enjoyment of her estate, was effected through the medium of a trust. It is not, however, necessary that a *trustee* should be expressly nominated. It was, indeed, at one time doubted whether a trustee would not be necessary,³ but it is now settled that where there is a gift to a married woman, and no

¹ When the settlement to the separate use of a married woman is made in pursuance of an ante-nuptial contract, no policy of the law is violated. It is simply the fulfilment of a contract. Lewin on Trusts, 120.

² See *Wells v. McCall*, 14 P. F. Sm. 212, (per Agnew, J.); *Dodson v. Ball*, 10 *Id.* 492.

³ By Lord Cowper in *Harvey v. Harvey*, 1 P. Wms. 125.

trustee is named, the husband will be considered as a trustee;¹ especially if the gift be from him directly to the wife, for in this last case the gift could be supported in no other way.²

100. It may also be here observed that no particular form of words is necessary to create a trust for the benefit of a *feme coverte*.

According to the modern English authorities, the most apt word to create such a trust is "separate;" which has a fixed and technical meaning, and which will, of itself, exclude the marital rights; whereas the same fixed and technical meaning is not attributable to "sole."³

Any form of expression, however, indicative of an intention to confer the beneficial enjoyment upon the wife, and to exclude the rights of the husband, will be enough. It would be almost impossible to give all the expressions which have been held to be sufficient; the following are instances: "for her sole and separate use;"⁴ "for her own use and benefit independent of any other person;"⁵ her husband "to have no control;"⁶ "for the use, maintenance, and support;"⁷ "solely for her own use;"⁸ "absolutely;"⁹ "her receipt to be a sufficient discharge."¹⁰

¹ Bennet v. Davis, 2 P. Wms. 316; Parker v. Brooke, 9 Ves. 583; Jamison v. Brady, 6 S. & R. 466; Vance v. Nogle, 20 P. F. Sm. 179; Barron v. Barron, 24 Vt. 375; Long v. White, 5 J. J. Marsh. 226; Trenton Banking Co. v. Woodruff, 1 Green, 117; Steele v. Steele, 1 Ired. Eq. 452; Freeman v. Freeman, 9 Missouri, 772; Hamilton v. Bishop, 8 Yerg. 33; Fears v. Brooks, 12 Georgia, 195; Whitten v. Jenkins, 34 Id. 297; Hill on Trustees, 628 (4th Am. ed.); Perry on Trusts, § 647.

² Steel v. Steel, 1 Ired. Eq. 452, 455; McKennan v. Phillips, 6 Wharton, 571. See, however, Wade v. Fisher, 9 Rich. Eq. 362, where the gift was not upheld. In Penna. Salt Co. v. Neel, 4 P. F. Sm. 17, such a conveyance was sustained in a common law action.

³ See Gilbert v. Lewis, 1 De G. J. & Sm. 38; Lewis v. Matthews, L. R. 2 Eq. 177; Massey v. Bowen, L. R. 4 H. L. Cas. 288.

⁴ Parker v. Brooke, 9 Vesey, 583; Archer v. Rorke, 7 Ir. Eq. 478.

⁵ Margetts v. Barringer, 7 Sim. 482.

⁶ Edwards v. Jones, 14 Weekly Rep. 815.

⁷ Good v. Harris, 2 Ired. Eq. 630. See, also, for the same or nearly identical expressions, Newman v. James, 12 Alab. 29; Warren v. Haley, 1 Sm. & Marsh. Ch. 647; Heathman v. Hall, 3 Ired. Eq. 414; Griffith v. Griffith, 5 B. Mon. 113.

⁸ Jamison v. Brady, 6 Serg. & Rawle, 466; Jarvis v. Prentice, 19 Conn. 273; Goodrum v. Goodrum, 8 Ired. Eq. 313; Cuthbert v. Wolfe, 19 Alab. 373; Stuart v. Kissam, 2 Barb. 494.

⁹ Shewell v. Dwarris, Johns. 172; Brown v. Johnson, 17 Alab. 232.

¹⁰ Lee v. Prieaux, 3 Bro. Ch. 381; Stanton v. Hall, 2 R. & M. 180; Charles v. Coker, 2 S. Carolina, 122.

On the other hand, the following have been considered as insufficient to raise a trust: "to her use;"¹ "to her own use;"² "to her heirs and assignees, for her or their own sole use;"³ "for her use and benefit."⁴

Whether a provision that the property "is not to be liable to her husband's debts," will be enough to create a separate trust, cannot perhaps be declared with certainty, as the authorities are not uniform.⁵

It is obviously impossible to lay down any authoritative rules by which all the decisions upon this subject can be reconciled. But the classification suggested in *Nix v. Bradley*⁶ seems to be highly satisfactory. It was there said that the expressions whereby a separate estate could be created might be grouped in three classes: 1st. Where the technical words "sole and separate use," or equivalent words, are used. 2d. Where the marital rights are expressly excluded. 3d. Where the wife is empowered to perform acts concerning the estate given to her, inconsistent with the disabilities of coverture.

101. It was said above, that the objects sought to be attained by the trusts now under consideration, were very nearly defeated by the construction which the English Court of Chancery placed upon the authority and powers of the *feme* over property so limited. This construction was that a *feme coverte* was, as to her sole and separate estate, to be regarded as a *feme sole*, and that therefore she had the same power of disposition over the estate, and was subject to the same liabilities in regard to it, as if she were unmarried.

Her power of disposing of her estate was settled by many authorities.

"The first case upon the subject," said Lord Thurlow, in *Fettiplace v. Georges*,⁷ "is a very old one in Tothill; that when a woman from her separate stock has saved a sum of money, she

¹ *Jacobs v. Amyatt*, 1 Mad. 376, n.;
Torbert v. Twining, 1 Yeates, 432; *Tenant v. Stoney*, 1 Rich. Eq. 222.

² *Johnes v. Lockhart*, 3 Bro. Ch. 383, n.

³ *Lewis v. Mathews*, L. R. 2 Eq. 177;
Rudisell v. Watson, 2 Dev. Eq. 430;
Houston v. Embry, 1 Sneed, 480. See,
also, *Tylor v. Lake*, 2 R. & M. 183.

⁴ *Fears v. Brooks*, 12 Georgia, 198;
Clevenstine's Appeal, 3 Harris (Pa.), 499.

⁵ *Gillespie v. Burleson*, 28 Alab. 551;
Martin v. Bell, 9 Rich. Eq. 42; *Young v. Young*, 3 Jones Eq. 266.

⁶ 6 Rich. Eq. 48.

⁷ 1 Ves., Jr. 48.

may dispose of it. I know there is a vast number of cases upon it; but I have always thought it settled that from the moment a woman takes personal property to her sole and separate use, from the same moment she has the sole and separate right to dispose of it." And this right may be exercised by a disposition *inter vivos*;,¹ or by will.² This power of disposition was formerly supposed to apply only to personalty, and to a life interest in realty; but it is now held in England that the *feme* is entitled to dispose of the *corpus* of her real estate;³ and that too by will or by deed, not acknowledged according to the formalities of the statute.⁴

102. The same line of reasoning, which induced the English courts of equity to recognize the *power* of a married woman to alienate her separate estate, has also led to a recognition of the liability of this estate to the general engagements of the *feme*. The separate property of a married woman being a creature of equity, it follows, that, if she has the power to deal with it, she has the other power incident to property in general, viz., the power of contracting debts to be paid out of it; and equity will lay hold of the separate estate as the only means by which those debts can be satisfied.⁵ This liability was at first supposed to exist only when the *feme* had executed some obligation under seal;⁶ but the courts have now reached the conclusion that the same liability exists in respect of a mere verbal engagement; and that when a married woman enters into an agreement, she allows the supposition to be made that she intends to perform the agreement out of her property, and that she creates a debt which may be recovered, not by reaching her but by reaching her property.⁷ When a man contracts debts, both his person and his property are by law liable to the payment of them. A court of equity, having created a separate estate, has enabled a married woman to contract debts in respect of it. Her person cannot be made liable,

¹ *Wagstaff v. Smith*, 9 Vesey, 520.

² *Rich v. Cockell*, 9 Vesey, 869.

³ *Taylor v. Meads*, 34 L. J. Ch. 203; 11 Jur. N. S. 166.

⁴ *Id.*

⁵ *Hulme v. Tenant*, 1 Lead. Cas. Eq. 394 (481, 4th Eng. ed.); *Owens v. Dickinson*, 1 Cr. & Ph. 48; *Perkins v. Elliott*, 8 C. E. Green, 529.

⁶ *Hulme v. Tenant*, 1 Bro. C. C. 16.

⁷ *Picard v. Hine*, L. R. 5 Chan. App.

274; *Johnson v. Gallagher*, 3 De G. F. & J. 494; *Londou Bank of Australia v. Lempriere*, 4 Priv. Coun. App. 572; *Murray v. Barlee*, 3 M. & K. 209; *Matthewman's Case*, L. R. 3 Eq. 761; *Shattock v. Shattock*, L. R. 2 Eq. 182.

either in law or in equity,¹ but in equity her property may. A court of equity gives execution, therefore, against the property, just as a court of law gives execution against the property of other debtors. These are the views expressed by Lord Justice Turner, in *Johnson v. Gallagher*,² and must now be taken as the settled law of England upon the subject.³ It must be here observed that the courts have not yet gone to the length of holding that a mere general engagement of a married woman will in all cases affect her separate estate. The true view seems to be, that such an engagement will be binding if it appears that it was made with reference to, and upon the faith and credit of, her separate estate; but that whether it was so or not is a question to be judged of by the court under all the circumstances of the case. The fact that the *feme* is living separate from her husband, and is known not to be receiving maintenance from him, is considered evidence to show that the contract was made with reference to her separate estate.⁴

It was at one time supposed that the contract of a *feme covert* operated as an appointment of her separate estate;⁵ but this idea is now exploded; as it is manifest that to hold such a doctrine would lead to the conclusion that the debts were to be paid in the order of their creation, whereas they all stand on an equal footing, and are paid *pari passu*.⁶

103. In the United States the decisions upon the power of a

¹ It had been decided in *Corbett v. Poelnitz*, 1 T. R. 5, that an action at common law would lie when the wife has a separate maintenance and lives apart from her husband, and receives credit upon the possession of the estate; but this was subsequently overruled in *Marshall v. Rutton*, 8 T. R. 545.

² 3 De G. F. & J. 509.

³ See the opinions of the Lord Chancellor, Hatherley, and of Lord Justice, Sir G. M. Giffard, in *Picard v. Hine*, L. R. 5 Chan. App. 274. See, also, *London Bank of Australia v. Lempriere*, L. R. 4 Priv. C. App. 572. In Massachusetts, see *Rogers v. Ward*, 8 Allen, 389.

⁴ *Picard v. Hine*; *Johnson v. Gallagher*, *ut sup.*; *Johnson v. Cummins*, 1 C.

E. Green, 97, and *Harrison v. Stewart*, 8 *Id.* 451.

⁵ *Clark v. Miller*, 2 Atk. 879; *Murray v. Barlee*, 4 Sim. 82, by Sir L. Shadwell, V. C.

⁶ *Murray v. Barlee*, 3 M. & K. 209, reversing the Vice Chancellor in 4 Sim. 82; *Owens v. Dickinson*, 1 Cr. & Ph. 48. The decision of Lord Eldon, in *Nantes v. Corrock*, 9 Ves. 189, that the stock of a *feme covert* was not bound by her engagements because it was not liable to execution, also shows that the liability is not by way of appointment, for, if it were, the circumstance that stock was a species of property not liable to execution would be entirely immaterial.

feme covert over her separate estate, and its liability to her engagements, have not been uniform. The first departure from the English rule was in South Carolina, in the year 1811. In the case of *Ewing v. Smith*,¹ the Court of Appeals (overruling the decision of Chancellor Desaussure) held that a *feme covert* had no powers over her separate estate except those which had been given to her by the trust instrument, and that the powers conferred must be strictly pursued. The same rule was established in Pennsylvania, in the leading case of *Lancaster v. Dolan*,² and was upheld and enforced in subsequent decisions.³ It was, indeed, held in that State, in *Haines v. Ellis*,⁴ that the law had been altered by the Married Woman's Act of 1848; but this decision, which was manifestly erroneous, was subsequently overruled.⁵ The South Carolina rule was also adopted in Rhode Island,⁶ Tennessee,⁷ Mississippi;⁸ Illinois⁹ and, formerly, in Maryland.¹⁰

On the other hand, the English rule has been followed in a number of the States. It was adopted in New York in *Jaques v. The Methodist Church*,¹¹ overruling Chancellor Kent, who had decided the other way.¹² Although more recent decisions have somewhat modified the doctrine.¹³ The English rule was also followed in New Jersey,¹⁴ Connecticut,¹⁵ Kentucky,¹⁶ Virginia,¹⁷ North Carolina,¹⁸ Alabama,¹⁹ Georgia,²⁰ Missouri,²¹ and Maryland;²² and also in Vermont, to the extent at least that a married woman can charge the property for her own

¹ 3 Desaus. 417.

² 1 Rawle, 231.

³ *Rogers v. Smith*, 4 Barr, 93; *Thomas v. Folwell*, 2 Wharton 11.

⁴ 12 Harris, 253.

⁵ *Penna. Ins. Co. v. Foster*, 11 Casey, 134; *Wright v. Brown*, 8 Wright, 224.

⁶ *Metcalf v. Cook*, 2 R. I. 355.

⁷ *Marshall v. Stephens*, 8 Hump. 159. See, however, *Young v. Young*, 7 Cold. 461.

⁸ *Doty v. Mitchell*, 9 Sm. & M. 435.

⁹ *Swift v. Castle*, 23 Ill. 209.

¹⁰ *Miller v. Williamson*, 5 Maryl. 219; *Tarr v. Williams*, 4 Maryl. Ch. 68; but see *Cooke v. Husbands*, 11 Maryl. 492. See, also, the American note to *Hulme v. Tenant*, 1 Lead. Cas. Eq. 537; Hill on

Trustees (4th Am. ed.) 657; and Perry on Trusts, § 655.

¹¹ 17 Johns. R. 548.

¹² 3 J. C. R. 78.

¹³ See *Yale v. Dederer*, 18 N. Y. 265; 22 N. Y. 456.

¹⁴ *Leacrayft v. Heddon*, 3 Green Ch. 512; *Perkins v. Elliott*, 8 C. E. Green, 529.

¹⁵ *Imlay v. Huntingdon*, 20 Conn. 175.

¹⁶ *Coleman v. Wooley*, 10 B. Mon. 320. This subject is now regulated by statute in this State.

¹⁷ *Vizonneau v. Pegram*, 2 Leigh, 183.

¹⁸ *Newlin v. Freeman*, 4 Ired. Eq. 312.

¹⁹ *Bradford v. Greenway*, 17 Alab. 805.

²⁰ *Fears v. Brooks*, 12 Geo. 200.

²¹ *Kimm v. Weippert*, 46 Mo. 532.

²² *Buchanan v. Turner*, 26 Maryl. 5.

benefit;¹ and so also in Florida.² These States, too, have followed substantially the English rule upon the subject of the liability of the estates of *femes covert* to their separate engagements.³

The same general rule has also been approved in the federal courts.⁴

Those States which were mentioned as having followed the lead of the South Carolina case of *Ewing v. Smith*, in regard to the power of a married woman to convey her separate estate, have also generally refused to adopt the English rule upon the subject of the *feme's* power to bind it by contract.⁵ In South Carolina and Massachusetts, however, the separate estate is chargeable for debts contracted on its account and for its use, but not for the general engagements of the *feme*.⁶

104. The English rule above stated, in reference to the powers of a *feme covert* over her separate estate, and the liability of that estate to her engagements, naturally led to some plan by which the operation of the rule could be avoided, and the will of the donor carried out by giving the married woman the property in such a way that it would be protected against herself (so to speak) and her creditors, as well as against her husband and his indebtedness. The plan adopted was the insertion, in the trust instrument, of the clause against anticipation which was first invented by Lord Thurlow, and used in drawing Miss Watson's settlement.⁷ This clause, viz., "not by way of anticipation," was held to be effective in imposing a restraint upon alienation,⁸ and became the usual language in settlements. No particular form

¹ *Frary v. Booth*, 37 Verm. 78.

² *Lewis v. Yale*, 4 Florida, 418.

³ *Gunter v. Williams*, 40 Alab. 572; *Armstrong v. Ross*, 5 C. E. Green, 109; *Van Kirk v. Skillman*, 5 Vroom, 109; *Batchelder v. Sargent*, 47 N. Hamp. 265; *Imlay v. Huntington*, 20 Conn. 175; *Cook v. Husbands*, 11 Maryl. 492; *Penn v. Whitehead*, 17 Grat. 503; *Ozley v. Ikelheimer*, 26 Alab. 382; *Lillard v. Turner*, 16 B. Mon. 374; *Harris v. Harris*, 7 Ired. Eq. 111; *Whitesides v. Cannon*, 23 Missouri, 457; *Schafroth v. Ambs*, 46 Id. 114; *Lewis v. Yale*, 4 Flor. 418; *Robert v. West*, 15 Ga. 123; *Dallas v. Heard*, 32 Id. 604. In New York, see *Yale v. Dederer*

(*supra*), and *Ballin v. Dillaye*, 37 N. Y. 35. In Wisconsin, *Todd v. Lee*, 15 Wis.

365; 16 Id. 480. In Tennessee, see *Hughes v. Peters*, 1 Cold. 67.

⁴ *Cheever v. Wilson*, 9 Wall. 119.

⁵ *Lancaster v. Dolan*, 1 Rawle, 231; *Metcalf v. Cook*, 2 R. Island, 355; *Litton v. Baldwin*, 8 Hump. 159; *Bailey v. Pearson*, 9 Foster, 77; *Perry on Trusts*, § 661.

⁶ *Magwood v. Johnston*, 1 Hill, Eq. 228; *Adams v. Mackay*, 6 Rich. Eq. 75; *Willard v. Eastham*, 15 Gray, 328; *Rogers v. Ward*, 8 Allen, 388.

⁷ *Lewin*, p. 123.

⁸ *Parkes v. White*, 11 Ves. 221.

of words is, however, necessary. It is enough if the intention to impose the restraint be clearly expressed.¹

It will be observed that this restraint upon alienation is a violation of the ordinary rules of property, the general principle being that the power of alienation is a necessary and inseparable incident of ownership which cannot be taken away by any condition or stipulation in the grant. But it being once settled that a wife might enjoy a separate estate as a *feme sole*, the laws of property attached to this new estate; and it was found, as part of such laws, that the power of alienation belonged to the wife, and was destructive of the security intended for her estate. Equity again interfered, and by another violation of the laws of property, supported the validity of the prohibition against alienation.²

105. An important question which naturally presents itself in regard to these trusts is, "for whose benefit can they be created?" For it is obvious that the trust may either be created for the benefit of a woman *coverte* at the time, or may be created in contemplation (more or less immediate) of coverture, or may be created for a *feme sole* without any such contemplation. In other words, can a sole and separate use be limited to a *feme sole* which will come into operation whenever coverture takes place; or can the trust be called into being merely for the benefit of a woman actually married at the time of its creation?

In England, this question was considered in the year 1834, in the case of *Massey v. Parker*.³ It was there decided that where a trust of this description was created for the benefit of a *feme sole*, it would upon her marriage be ineffectual to debar her husband from his marital rights. This decision, which was made by Lord Cottenham when Master of the Rolls, was, however, afterwards overruled by the same judge, as chancellor, in the subsequent case of *Tullett v. Armstrong*,⁴ where the rule was laid down that a valid separate trust could be created for the benefit of a woman, unmarried at the time, which would come into active operation whenever a marriage took place; and which, moreover, would not cease entirely upon discoveriture,

¹ Notes to *Hulme v. Tenant*, 1 Lead. Cas. Eq. 394.

³ 2 M. & K. 174.

⁴ 4 M. & Cr. 377.

² By Lord Cottenham, in *Tullett v. Armstrong*, 4 My. & Cr. 405.

but would revive and again take effect upon a subsequent marriage. This rule has been adhered to in England, and is now firmly established by many decisions.

But it must here be remarked that while a trust for the sole and separate use of a *feme* may be created when she is *sole*, yet, if she chooses to make any disposition of the property before coverture, she is at liberty to do so; and that no restraint upon her power of alienation will be tolerated, if she elects to exercise that power before she becomes *coverte*. In other words, a *feme* when *discoverte* has the same power over an estate limited to her sole and separate use, as any other person *sui juris*; she has the option of determining the trust when unmarried; if she does not choose so to determine it, it will attach upon the first or any subsequent coverture.¹

106. The decision in *Massey v. Parker* has been followed in Pennsylvania,² in Arkansas,³ and in North Carolina.⁴ In the first named State it must now be considered the settled law that a separate use trust cannot be created except for a married woman, or one in immediate contemplation of marriage.⁵ Whether "immediate contemplation of marriage" may or may not exist in any particular case, must, it is evident, be a question of fact not always easy to determine. The fact of the marriage taking place shortly after the creation of the trust, is said to be evidence that it was in immediate contemplation.⁶

But in other States of the Union the present English rule has been adopted.⁷

107. The restraint upon alienation, of course, will not prevent the *feme* from disposing of the property settled to her separate use, if she chooses to do so before marriage, or in the interval between different covertures; but the restraint will attach whenever coverture takes place. This is the English rule. But in those States where the separate use can only be created for the

¹ See in this connection the case of *Springer v. Arundel*, *Id.* 218; *Ogden's Wright v. Wright*, 2 Johns. & H. 647. *Appeal*, 20 *Id.* 501.

² *Hamersley v. Smith*, 4 Wharton, 126; *Smith v. Starr*, 3 *Id.* 62.

³ *Lindsay v. Harrison*, 3 Eng. 311.

⁴ *Apple v. Allen*, 3 Jones Eq. 120; though see *Bridges v. Wilkins*, *Id.* 342.

⁵ *McBride v. Smyth*, 4 P. F. Sm. 245.

⁶ *Wells v. McCall*, 14 P. F. Sm. 207;

⁷ *Beaufort v. Collier*, 6 Hump. 487; *Shirley v. Shirley*, 9 Paige, 363; *Fellows v. Tann*, 9 Alab. 1003; *Fears v. Brooks*, 12 Geo. 197; *Waters v. Tazewell*, 9 Maryl. 291; *Staggers v. Matthews*, 13 Rich. Eq. 154.

benefit of women who are either actually married, or in immediate contemplation of matrimony, the clause in regard to anticipation is subject to the same rules, and it will be ineffectual except in the two specified cases.

The law upon this subject may, perhaps, be summed up in the questions propounded by Lewin, and in the answers thereto—as follows:—

1. Can property given to the separate use of a woman be disposed of by her before her marriage? This must be answered in the affirmative.

2. If the property is not so disposed of, does the separate use clause come into effective operation upon first and subsequent covertures? This must also be answered in the affirmative.

3. Is the clause against anticipation valid? It is.

It may be added that under the most recent English authorities, the trust for the sole and separate use extends to the absolute interest in personalty, and to the *corpus*, as well as to the income of real estate.¹

If a married woman dies without having disposed of her separate estate by will, her husband, except when controlled by statute, will take the same interest therein as he does in her legal or ordinary equitable estates.²

108. Akin to trusts for the separate use of married women, are what are known as “pin money” trusts.

Pin money may be defined to be a yearly allowance settled by the husband upon the wife, for her clothes or other separate personal expenses; and its principal incident is that its purpose is expenditure, and not accumulation. Hence, if a married woman suffers this allowance to remain unpaid for several years, she will be unable to recover more than one year's arrears from her husband or his estate; for the reason that, as this allowance is designed to be appropriated for her personal expenses, it must be presumed that if she has not drawn upon this fund, she has been supplied by her husband from other sources, and that it would therefore be unjust, after he has once supplied her wants, from time to time, to hold him responsible for the accumulation of her allowance, and thus, in effect, compel him to pay it twice.

¹ *Taylor v. Meads*, 34 L. J. Ch. 253. 229; *Faries' Appeal*, 11 Casey, 29;

² *Stewart v. Stewart*, 7 Johns. Ch. Perry on Trusts, § 668; *ante*, p. 68.

When, however, the wife's allowance has, in point of fact, been paid short, she may recover the accumulations.¹ On the other hand, where it appears that the husband has actually paid for his wife's expenses, she cannot even recover the one year's arrears. Nor can the wife's executors recover from the husband or his estate even one year's arrears; because the allowance is entirely personal with the wife, and the reason for its payment ceases with her death.

The leading case upon the subject is *Howard v. Digby*,² where the principles applicable to this species of trust will be found discussed.

109. It has been already mentioned, that the right of the husband to his wife's property is subject to this qualification, viz., that, if for the purpose of reaching her equitable property he is obliged to go into chancery, equity will compel him at her request to make a suitable provision for herself and her children.

110. It had been at first supposed that this right of the wife was of a passive rather than an active nature, and while capable of being enforced in a suit in which the husband was complainant, and which had been instituted by him for the purpose of getting in his wife's equitable *choses in action*, could not be actively asserted by the wife herself as plaintiff. This idea however was dissipated by the leading case of *Elibank v. Montolieu*.³ It was there held that the wife could come into chancery as complainant for the purpose of having a settlement made.

And the better opinion is that the same rule exists in the United States.⁴

Where, however, the property out of which a settlement is sought is real estate, the wife, it is said, cannot come in as plaintiff.⁵

In the United States, also, settlements have, in some cases, been

¹ *Ridout v. Lewis*, 1 Atk. 269.

² 8 Bligh, N. R. 224.

³ 5 Vesey, 737.

⁴ *Hill on Trustees*, 682 (4th Am. ed.); *Perry on Trusts*, § 629; *Kenny v. Udall*, 5 Johns. Ch. 464; 3 Cowen, 590; *Dearin v. Fitzpatrick*, Meigs, 550; *Poindexter v.*

Jeffries, 15 Grat. 363; and the dicta in many cases cited in the American note to *Murray v. Lord Elibank*, 1 Lead. Cas. Eq. 497. See, however, *Jackson v. Hill*, 25 Ark. 223.

⁵ *Gleaves v. Paine*, 1 De G. J. & Sm. 87.

compelled, when actions have been brought to recover the wife's property in the common law courts.¹

This equity is believed to exist in all of the United States except New Hampshire and North Carolina, and it has also been recognized in the federal courts.² In those States where the property of married women is secured to them by statute, the reasons for the existence of this right have passed away, and as such statutes exist in nearly all of the States of the Union, the subject is not of such practical importance as formerly;³ and in England also the Married Woman's Property Act of 1870⁴ has greatly diminished the necessity for the application of this doctrine. It is still, however, proper to say a few words concerning the wife's "equity to a settlement" (as it is termed), and to notice how it may be enforced, out of what property, against whom, and for whose benefit.

When property of a married woman is vested in trustees, they may with perfect safety hand over the same to her husband, and take his receipt therefor, except, of course, in the case of property settled to her separate use;⁵ or where the common law rule has been altered by statute. The trustees may, if they choose, refuse to make payment to the husband; who is then obliged, in order to get in the fund, to come into court and to submit to his wife's right to a settlement. In such a case the trustees will not be liable to costs. The wife's equity to a settlement will also be recognized by the courts, in bills filed by the creditors of the husband to reach the wife's choses in action.⁶

If the husband has become the purchaser, as it were, of his wife's property by settlement before marriage, he will not be compelled to make any allowance for her out of her equitable

¹ *Rees v. Waters*, 9 Watts, 94; *Perry on Trusts*, § 629.

² *Ward v. Amory*, 1 Curtis, 432; *Tucker v. Andrews*, 13 Maine, 124; *Short v. Moore*, 10 Verm. 446; *Howard v. Moffatt*, 2 John. Ch. 206; *Wiles v. Wiles*, 3 Maryl. 1; *Poindexter v. Jeffries*, 15 Grat. 363; *Durr v. Bowyer*, 2 McCord's Ch. 368; *Andrews v. Jones*, 10 Alab. 401; *Davis v. Newton*, 6 Met. 537. In Pennsylvania, it is enforced by preventing a recovery in a legal action, unless upon the terms of

making a suitable provision for the wife; *Rees v. Waters*, 9 Watts, 94. In New Hampshire it has not been recognized; *Parsons v. Parsons*, 9 N. Hamp. 309; *Hill on Trustees*, 631 (4th Am. ed.); *Notes to Murray v. Lord Elibank*, 1 Lead. Cas. Eq. 493 (3d Am. ed.).

³ See *Perry on Trusts*, § 645, note 9.

⁴ 33 and 34 Vic., c. 93 (*supra*, p. 109).

⁵ *Perry on Trusts*, § 627.

⁶ *Smith v. Kane*, 2 Paige, 303; 1 Lead. Cas. Eq. 496.

funds. In such a case he is considered to have acquired a right to the whole of his wife's fortune, not only by virtue of his marital right, but by purchase for value.¹ This rule, however, does not apply to property which the *feme* acquires subsequent to the coverture, and which is not included in the contemplated settlement. Out of this property she is entitled to her equity to a settlement.² Nor will the *feme* be deprived of this equity by a voluntary settlement *after* marriage.³

The wife cannot claim a settlement, if she has an adequate provision already.⁴

If a woman at the time of her marriage owes more than the amount of her property, she will not be entitled to a settlement;⁵ but if the property exceeds the amount of her debts, she may be entitled to a settlement after provision has been made for the payment of her debts.⁶

A married woman may preclude herself from claiming her equity to a settlement by fraud,⁷ or by improper conduct, such as adultery.⁸

111. The wife may waive her right to a settlement, unless her children have already acquired an interest therein. This waiver takes place on a separate examination of the wife, by which it is ascertained that her consent is given of her own free will, and is not obtained from her by fraud or force.⁹ This consent cannot be taken if the wife is an infant.¹⁰

112. It is well settled that the equity to a settlement will attach to real estate, and to chattels real as well as to personal property; and it will attach to any property which becomes

¹ Perry on Trusts, § 635; Erskine's Trusts, 1 K. & J. 302.

² Garforth v. Bradley, 2 Ves. 677. See Matter of Beresford, 1 Desaus. 263.

³ Hill on Trustees, 409; though see Dunkley v. Dunkley, 2 De G. M. & G. 390; and Matter of Beresford, 1 Desaus. 263.

⁴ Notes to Murray v. Lord Elbank, 1 Lead. Cas. Eq. 472.

⁵ Bonner v. Bonner, 17 Beav. 86.

⁶ Barnard v. Ford, L. R. 4 Ch. App. 247.

⁷ Lush's Trusts, L. R. 4 Ch. App. 591.

⁸ Carr v. Eastbrooke, 4 Ves. 146; *In re* Lewin's Trust, 20 Beav. 378.

⁹ Beaumont v. Carter, 32 Beav. 586; 1 Lead. Cas. Eq. 468 (4th Eng. ed.). Examinations of a similar character are prescribed by statute in many States where a conveyance of the real estate of a *feme covert* is made.

¹⁰ Stubbs v. Sargon, 2 Beav. 496; Abraham v. Newcombe, 12 Sim. 566. See, however, Jennings v. Jennings, 2 Heisk. 28.

the subject of an equitable suit, even though it is legal in its nature.¹

The equity to a settlement exists in respect of the wife's life interest as against an insolvent or bankrupt husband, or as against his general assignee in bankruptcy or insolvency.² But not as against her husband who supports her; or as against his particular assignee for value,³ even if he does not support her. The assignment of the wife's life interest will be good only during coverture, and will not bind her if she survives.

The court will not order a settlement of reversionary personal property of the wife.⁴

The court will not ordinarily settle the whole fund upon the wife. A half is considered a fair settlement.⁵ The *whole* may, however, be settled under special circumstances.⁶

113. This equity is enforceable as against the husband and all persons claiming under him, whether they are assignees for value,⁷ or voluntary assignees, or assignees in bankruptcy. And this equity is paramount to the right of set-off which an executor or administrator, from whom a legacy or distributive share was due to the wife, has by reason of any indebtedness of the husband to the estate.⁸ This, however, must be subject to the qualification noticed above, that where the interest, out of which the settlement is sought, is a life estate, it cannot be enforced as against the husband if he supports the wife, or against his particular assignee for value. The reason of this exception is that the assignment of the life estate will be good only during coverture.

The equity to a settlement is the privilege of the wife, and can be enforced only by her, and may be waived by her after a separate examination. Nevertheless, when made it will enure to the benefit of the children. The children, however, cannot assert the right themselves; and if the wife dies before decree, the husband will take.⁹

¹ Perry on Trusts, § 633.

² Sturgis v. Champneys, 5 My. & Cr. 97; Vaughan v. Buck, 1 Sim. N. S. 284. See Beeman v. Cowser, 22 Ark. 429; Perry on Trusts, § 634.

³ Tidd v. Lister, 10 Hare, 140; 3 De G. M. & G. 857. See Sims v. Spaulding, 2 Duvall, 121.

⁴ Osborn v. Morgan, 9 Hare, 432.

⁵ 1 Lead. Cas. Eq. 464 (4th Eng. ed.).

⁶ Perry on Trusts, § 636.

⁷ Macaulay v. Philips, 4 Ves. 19.

⁸ 1 Lead. Cas. Eq. 364; Perry on Trusts, § 632.

⁹ Perry on Trusts, § 627; 1 Lead. Cas. Eq. 375.

When a person has committed a contempt by marrying a ward of the court, the court will order a settlement of her property to be made; and under such circumstances the settlement will be made to embrace her property of all kinds, legal as well as equitable, and will generally be of the whole estate.¹ So, when the husband has misbehaved, or has become utterly insolvent, settlements of purely legal property have been enforced. These cases proceed upon somewhat different doctrines, however, from the pure equity to a settlement already considered.²

114. In considering the equitable doctrines which are applicable to the property of married women, the subject of gifts from the husband to the wife requires to be noticed.

The existence of a married woman being supposed to be merged in that of her husband, a conveyance from the latter to the former at common law is of no effect.

Deeds which operate at common law, and not under the statute of uses, pass no title to the wife.

In equity, however, the rule is otherwise. Gifts from the husband to the wife will be upheld, and if the legal title does not pass out of the former, he will, nevertheless, be considered to be a trustee for his wife, and the transaction will be upheld as a settlement. Equity, however, while upholding the gift, has thought it right to attach to it this qualification, viz., that the settlement must be a reasonable one. Equity will not assist the husband to impoverish himself for the sake of his wife. To do so would be to injure his credit, and to act unfairly towards those who might afterwards become his creditors. The settlement, therefore, must not be actually fraudulent; that is, it must not be made while he is in embarrassed circumstances, or about to engage in a hazardous business, or in any way be calculated to deceive and injure *bona fide* creditors; and it must be a reasonable proportion of his estate. What that proportion is, does not appear to be definitely settled.³

¹ 1 Lead. Cas. Eq. 496; Perry on Trusts, § 631.

² Perry on Trusts, § 631. In some cases in the United States maintenance in the nature of alimony has been decreed by courts of equity. Purcell v. Purcell, 4 Hen. & Munf. 507; Paterson v. Pater-

son, 1 Hals. Ch. 389. In some States, jurisdiction in divorce is made a head of equitable relief. See statutes cited, *ante*, p. 18, *et seq.*

³ Sims v. Rickets, 35 Ind. 131; Benedict v. Montgomery, 7 Watts & Serg. 238; Coates v. Gerlach, 8 Wright (Pa.), 43.

Contracts between husband and wife will sometimes be enforced in equity.¹ And although, at common law, contracts between a man and woman would be extinguished by subsequent intermarriage, yet in equity the parties will be compelled to execute them. Of such contracts illustrations may be found in antenuptial contracts, made without the intervention of trustees.²

115. Before leaving the subject of trusts for married women, it will be proper to say a few words upon a kindred topic, namely, contracts for separation between husband and wife.

It has been decided by the highest authority and in many cases that agreements for *future* separation are invalid, and such must be considered as the settled law both in England and in the United States.³

But agreements for *immediate* separation, although formerly discountenanced as against the policy of the law, are now sustained in England, and are looked upon with more favor in this country. In *Wilson v. Wilson*,⁴ it was decided by the House of Lords that the court of chancery might compel parties to articles for an agreement of separation, to execute a deed in pursuance thereof. The agreement, however, must be founded on a sufficient consideration;⁵ and the deed to be executed must not contain any conditions contrary to law, or in contravention of public policy.⁶

A covenant not to sue for the restoration of conjugal rights is a proper covenant to insert in a deed of separation, executed under a decree of the court, which directs articles of separation to be

¹ *Tennison v. Tennison*, 46 Mo. 77; *Bradish v. Gibbs*, 3 Johns. Ch. 523; *Livingston v. Livingston*, 2 *Id.* 537; *More v. Freeman*, Bunb. R. 205.

² See *Neves v. Scott*, 9 Howard, 196; *Imlay v. Huntingdon*, 20 Conn. 146; *West v. Howard*, *Id.* 581; *De Barante v. Gott*, 6 Barb. 492; *Healy v. Rowan*, 5 Grat. 414; *Story's Eq.* § 1370.

³ *Westmeath v. Westmeath*, 1 Dow & C. 519. Note to *Stapilton v. Stapilton*, 2 Lead. Cas. Eq. 855 (4th Eng. edition), where the English authorities are col-

lected; *Hill on Trustees*, 668, 669 (4th Am. ed.); *Perry on Trusts*, § 672. In *Hunt v. Hunt*, 10 W. R. 215, the subject will be found most clearly explained by Lord Westbury.

⁴ 1 H. L. Cas. 538; 5 *Id.* 40. See also *Gibbs v. Harding*, L. R., 5 Ch. App. 336.

⁵ *Walrond v. Walrond*, Johns. 18; *Beach v. Beach*, 2 Hill, 260; *Griffin v. Banks*, 37 New York, 623.

⁶ *Vansittart v. Vansittart*, 2 De G. & Jo. 255.

carried out; and such a covenant will be enforced by an injunction restraining the husband from suing.¹ And an injunction will be granted to restrain a husband from molesting his wife, or a wife from molesting her husband, contrary to covenants contained in deeds of separation.² Whether an injunction would be granted to restrain proceedings for a restitution of conjugal rights, when there has been merely an *agreement* for articles of separation, seems to be doubtful.³

It is well settled that when a separation deed has been actually executed, the court will enforce any of its stipulations which are in accordance with law.⁴

Some of the more recent authorities in this country have followed the ruling in *Wilson v. Wilson*. Thus, in Pennsylvania, Ohio, and Indiana, the law in that case has been expressly recognized;⁵ and the doctrine appears to be approved in Vermont.⁶

In other States, however, it has been held that equity will refuse to decree specific performance of separation articles.⁷

In England, and in some of the United States, the intervention of a trustee in a separation deed does not now appear to be necessary;⁸ but in other States the decisions are the other way.⁹

¹ *Hunt v. Hunt*, 10 W. R. 215, where the subject is elaborately examined by Lord Westbury; *Wilson v. Wilson*, 1 H. L. Cas. 538. See, also, *Williams v. Baily*, L. R. 2 Eq. 781.

² *Sanders v. Rodway*, 16 Beav. 207; *Flower v. Flower*, 20 W. R. 231.

³ See the remarks of Lord St. Leonards in *Wilson v. Wilson*, 5 H. L. Cas. 59, 60; and of Lord Chelmsford in *Vansittart v. Vansittart*, 2 De G. & Jo. 255.

⁴ See *Vansittart v. Vansittart*, 2 De G. & Jo. 255. Note to *Stapilton v. Stapilton*, 2 Lead Cas. Eq. 853.

⁵ *Hitner's Appeal*, 4 P. F. Sm. 114; *Thomas v. Brown*, 10 Ohio St. 250; *Dutton v. Dutton*, 30 Indiana, 455.

⁶ See *Barron v. Barron*, 24 Verm. 375.

⁷ See *Champlin v. Champlin*, 1 Hoff. Ch. 55; *Simpson v. Simpson*, 4 Dana. 140; *Rogers v. Rogers*, 4 Paige, 518; *Carter v. Carter*, 14 Sm. & Marsh. 59; *McCrocklin v. McCrocklin*, 2 B. Mon. 370; *Collins v. Collins*, Phillips Eq. 153; *Hill on Trustees*, 669 (4th Am. ed.).

⁸ *Frampton v. Frampton*, 4 Beav. 294; *Hutton v. Duey*, 3 Barr, 100; *Barron v. Barron*, 24 Verm. 375.

⁹ *Bettle v. Wilson*, 14 Ohio, 257; *Carson v. Murray*, 3 Paige, 483; *Tourney v. Sinclair*, 3 How. (Miss.) 324; *Watkins v. Watkins*, 7 Yerg. 283; *Simpson v. Simpson*, 4 Dana, 140; *Carter v. Carter*, 14 Sm. & M. 59; *Hill on Trustees*, 669; (4th Am. ed.); *Perry on Trusts*, § 673.

CHAPTER V.

TRUSTS FOR CHARITIES.

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| <p>116. Uncertainty in the object a characteristic of a charitable use.</p> <p>117. Importance of charitable uses.</p> <p>118. Origin of charitable uses; <i>Vidal v. Girard's Executors</i>.</p> <p>119. Statute of Elizabeth.</p> <p>120. Classification of charitable gifts; Gifts for eleemosynary purposes.</p> <p>121. Gifts for educational purposes.</p> <p>122. Gifts for religious purposes.</p> <p>123. Gifts for public purposes.</p> <p>124. Definitions of a charitable use; Mr. Binney's definition; <i>Jackson v. Phillips</i>.</p> | <p>125. Characteristics of a charitable use; uncertainty of the object.</p> <p>126. The <i>Cy pres</i> doctrine.</p> <p>127. <i>Jackson v. Phillips</i>.</p> <p>128. <i>Cy pres</i> doctrine in England, prerogative and judicial.</p> <p>129. Soundness of the latter doctrine.</p> <p>130. Rules in the different States.</p> <p>131. Nature of the uncertainty which should avoid a charitable gift.</p> <p>132. Resulting trusts in cases of charitable gifts; <i>Thetford School Case</i>.</p> <p>133. Perpetuities and Accumulations.</p> <p>134. Statutes of Mortmain.</p> |
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116. It has already been said that three things are necessary to raise a valid trust—sufficient words to create it, a definite subject, and a certain or ascertained object. To this rule there is a very noticeable exception in the case of trusts for charitable uses, wherein the trust will be sustained although the objects to be benefited may not be defined with that precision which would be requisite in trusts of an ordinary and private description. Uncertainty in the object is one of the characteristics of a true, technical, charitable use, because if the beneficiaries are defined with precision, the ordinary doctrines of equity, which have been already referred to, would be sufficient to support them.

It is when a trust which, if it were for an individual, would fail for want of certainty in the object, is supported in equity because it is for a charity, that the term charitable use is to be in strictness applied. A trust for a charity which is declared with the same certainty in all respects as ordinary trusts, is, of course, capable of being sustained by the ordinary rules of property;¹

¹ Thus a devise to a corporation to distribute the rents among twenty-four persons named, is not charitable, but it gives a vested right to each of the *cestuis qui trust*. *Liley v. Hey*, 1 Hare, 580.

but a trust which, according to those rules, would fail for uncertainty, is upheld in chancery when the beneficiaries are objects of charity, and is *then* a charitable use.¹

117. Trusts for charitable uses have occupied a large share of the attention of courts of chancery both in England and in this country; and it is perhaps not too much to say that in the federal courts, and in the tribunals of many of the States of the Union, the questions which grow out of the doctrine of charitable uses have been discussed with a degree of industry, of learning, and of research, that can scarcely be paralleled in the annals of jurisprudence. A reference to the reports of the great cases in which the wills of Stephen Girard, of Sarah Zane, and of Francis Jackson were construed, will be sufficient to bear out the correctness of this assertion.²

118. These trusts had been at one time supposed both in England and in this country to owe their origin to the statute of 43 Elizabeth, c. 4, commonly known as the statute of charitable uses; which was in point of fact an act designed merely to hunt up existing charities and enforce their administration; but which, because it enumerated certain trusts as charitable, came to be referred to as the origin of the jurisdiction of chancery over charitable uses, and as defining those uses which were to be considered charitable. This opinion existed in England,³ and was adopted in the United States in the case of the Trustees of the Baptist Church *v.* Hart's Executors.⁴ In 1844, however, in the great case of *Vidal v. Girard's Executors*,⁵ this opinion was shown to be erroneous. In his celebrated argument in that case, Mr. Binney, one of the counsel for the will of Stephen Girard, showed, by reference to the proceedings of the Court of Chancery in the time of Queen Elizabeth (which had been published by order of the record commission), that that tribunal had exercised

¹ *Jackson v. Phillips*, 14 Allen, 550; *Ravenel*, 17 Howard, 387; *Perin v. Carey*, 24 Howard, 503; *Lorings v. Marsh*, 6 Perry on Trusts, § 687.

² *Vidal v. Girard's Executors*, 2 Howard, 128; *Philadelphia v. Girard's Heirs*, 9 Wright, 27; *Magill v. Brown*, Brightly, 350; *Jackson v. Phillips*, 14 Allen, 539. See, also, *Baptist Association v. Hart's Exrs.*, 4 Wheaton, 1; *Ingles v. Sailors' Snug Harbor*, 3 Peters, 99; *Fontain v.*

Wallace, 337; *Gallego's Exrs. v. Att. Gen.* 8 Leigh, 450; *Witman v. Lex*, 17 Serg. & Rawle, 88; *Methodist Church v. Remington*, 1 Watts, 218.

³ 1 Spence's Eq. 589.

⁴ 4 Wheaton, 1.

⁵ 2 Howard, 128.

jurisdiction over trusts of this description prior to the passage of the statute of charitable uses. The cases mentioned in the report of the record commission are about fifty in number; and, although as to some of them it may not be satisfactorily demonstrated that they were instances of charitable uses, yet, upon the authority of these precedents, it is now settled that the jurisdiction of chancery upon this subject does not depend upon the statute, but existed independently of, and prior to, that enactment.

In his struggle with the pope, Henry VIII. was obliged to attack many charitable institutions for the purpose of asserting the power of the crown as against the claim of papal supremacy; and hence many charities were abolished by statute.¹ But in the reign of Elizabeth, after the conflict for ecclesiastical supremacy had been settled in favor of the English monarch, and the success of the Reformation had been assured, the necessity for institutions of an eleemosynary character began to re-assert itself, and several statutes were passed for the purpose of restoring and encouraging charitable foundations.² These acts finally culminated in the year 1601, in the statute of charitable uses, already mentioned.³

The question as to the origin of the jurisdiction upon this subject has this practical importance—viz., that in those States where the statute of Elizabeth is not in force or has not been adopted, the right of courts of equity to assume control over questions of this kind must depend upon their original jurisdiction.

119. While, however, the statute of Elizabeth is not to be regarded as the *origin* of charitable uses, it has always been looked to as furnishing a definition of what uses are to be considered as charitable. Although in those States in which the statute is not in force the courts will not confine themselves to the objects enumerated in the statute.⁴ These uses are set forth in the preamble to the statute, and are as follows: "The relief of aged, and impotent, and poor people; the maintenance of sick

¹ Perry on Trusts, § 691.

6; 43 *Id.*, c. 2 and 3. Perry on Trusts, §

² 1 *Eliz.*, c. 4, §§ 34, 35, 40; 8 *Id.*, c. 691.

11; 35 *Id.*, c. 3; 39 *Id.*, c. 4, 21; 31 *Id.*, c.

³ 43 *Eliz.*, c. 4; Perry on Trusts, § 692.

⁴ *Witman v. Lex*, 17 S. & R. 88.

and maimed soldiers and mariners; schools of learning; free schools; scholars in universities; houses of correction; repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways; the education and preferment of orphans; the marriages of poor maids; supportation and help of tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; and aid or ease of any poor inhabitants concerning the payment of fifteenths, setting out of soldiers, and other taxes." In addition to the above, many other objects have been decided to be charitable, because they were analogous to those mentioned in the statute, and were considered to be in conformity with the spirit of the preamble, or, in other words, although not within the strict letter of the statute, they have been held to fall within its "equity." Thus a gift for the "advancement of the Christian religion among infidels" is a good charity.¹ So is a gift for repairing a church;² for building an organ-gallery;³ for repairing a parsonage;⁴ or for the "worship of God."⁵ A gift for purposes of education is a charity;⁶ and so is a gift to a town for public improvements.⁷ On the other hand, trusts "for the political restoration of the Jews to Jerusalem;"⁸ "to secure the passage of laws granting women a right to vote and hold office;"⁹ "for a corporation to enable it to keep a larger supply of corn in London for the market;"¹⁰ "to build a monument, tomb, or vault for the donor;"¹¹ are illustrations of gifts which have been determined not to be charities. A gift for "charity" or for "charitable purposes," without adding more, is a good charitable bequest;¹² and so is a gift to a charitable association, although no charitable use is designated.¹³

120. The purposes for which charitable gifts may be made are

¹ Att. Gen. v. William and Mary's College, 1 Ves. Jr. 245.

² Att. Gen. v. Ruper, 2 P. Wms. 125.

³ Att. Gen. v. Oakaver, 1 Ves. Sr. 536.

⁴ Legard v. Hodges, 3 Bro. C. C. 441.

⁵ Att. Gen. v. Pearson, 3 Meriv. 353.

⁶ Vidal v. Girard; Whicker v. Hume, 7 H. L. Cas. 124; Smithsonian Inst. Case, 7 H. L. Cas. 155 (cited).

⁷ Att. Gen. v. Heelis, 2 S. & St. 67.

⁸ Habershon v. Vardon, 7 Eng. L. and Eq. 228; 4 De G. & Sm. 467.

⁹ Jackson v. Phillips, 14 Allen, 571.

¹⁰ Att. Gen. v. Haberdashers' Company, 1 My. & K. 420.

¹¹ Hoare v. Osborne, L. R., 1 Eq. 585; though see Adam v. Cole, 6 Beav. 353.

¹² Legge v. Asgill, Turn. & Russ. 265, n.; Mills v. Farmer, 19 Ves. 483; 1 Mer. 55; Perry on Trusts, § 705; Hill on Trustees, 452.

¹³ Evangelical Ass'n's Appeal, 11 Casey, 316.

so numerous that it is almost impossible to classify them; nevertheless, the four following heads, without including *all* possible charitable bequests, may be said to embrace a large majority of them:—

1. Gifts for strictly eleemosynary purposes, such as “to the poor,”¹ “to a parish,”² “for releasing poor debtors,”³ “for a hospital,”⁴ “for orphans,”⁵ “for the benefit of fugitive slaves,”⁶ “for poor relations,”⁷ or “for the relief of Indians.”⁸

121. 2. Gifts for educational purposes: as to a college for educating orphans,⁹ for advancement of learning,¹⁰ for the diffusion of knowledge among the working classes,¹¹ to erect a free grammar school,¹² or to promote the moral, intellectual, and physical instruction of a city,¹³ to increase the salaries of teachers,¹⁴ or for the foundation of scholarships and fellowships.¹⁵

122. 3. Gifts for religious purposes: as for the advancement of Christianity among the infidels,¹⁶ for the dissemination of the gospel,¹⁷ for foreign missions,¹⁸ for distributing Bibles and religious tracts,¹⁹ for the benefit of ministers of the gospel,²⁰ and for building, ornamenting, or repairing churches.²¹ It may be here

¹ Att. Gen. v. Matthews, 2 Lev. 167; (the Smithsonian Institution case), cited Howard v. American Peace Society, 49 Maine, 288; Heuser v. Harris, 42 Ill. 425.

² Att. Gen. v. Blizard, 21 Beav. 238; Att. Gen. v. Old South Society, 13 Allen, 474; State v. Gerard, 2 Ired. Eq. 210; Shotwell v. Mott, 2 Sand. Ch. 46; Overseers v. Tayloe, Gilm. 336.

³ Att. Gen. v. Ironmongers' Co., 2 My. & K. 576.

⁴ Corp. of Reading v. Lane, Duke, 81; Att. Gen. v. Kell, 2 Beav. 575.

⁵ Vidal v. Girard's Exrs., 2 Howard, 128.

⁶ Jackson v. Phillips, 14 Allen, 571.

⁷ Brunsden v. Woolridge, Amb. 507; Swasey v. American Bible Soc., 57 Maine, 527; Smith v. Harrington, 4 Allen, 566.

⁸ Magill v. Brown, Brightly, 347.

⁹ Vidal v. Girard's Exrs., 2 Howard, 128; Miller v. Atkinson, 63 N. C. 537.

See, also, Paschal v. Acklin, 27 Tex. 173; Miller v. Porter, 3 P. F. Sm. 292.

¹⁰ Whicker v. Hume, 1 De G. M. & G. 506; 7 H. L. Cas. 123. See the President of the United States v. Drummond

¹¹ Sweeney v. Sampson, 5 Ind. 465.

¹² Hadley v. Hopkins Academy, 14 Peck. 240; State v. McGowen, 2 Ired. Eq. 9.

¹³ Lowell's Appeal, 22 Pick. 215; Pickering v. Shotwell, 10 Barr, 27.

¹⁴ Price v. Maxwell, 4 Casey, 23.

¹⁵ Rex v. Newman, 1 Lev. 284; Att. Gen. v. Andrew, 3 Ves. 683; Case of Jesus Col., Duke, 78; Att. Gen. v. Bowyer, 3 Ves. 714.

¹⁶ Att. Gen. v. William and Mary's College, 1 Ves., Jr. 243.

¹⁷ Att. Gen. v. Wallace, 7 B. Mon. 611; Burr v. Smith, 7 Verm. 241.

¹⁸ Bartlet v. King, 12 Mass. 537; Fairbanks v. Lamson, 99 Mass. 533.

¹⁹ Att. Gen. v. Stepney, 10 Ves. 22; Winslow v. Cummings, 3 Cush. 358; Bliss v. American Bible Soc., 2 Allen, 334; Pickering v. Shotwell, 10 Barr, 23.

²⁰ Att. Gen. v. Gladstone, 13 Sim. 7.

²¹ See cases cited, *supra*, p. 130, notes.

observed that the only religious use which is mentioned in the statute of Elizabeth is that for "repairs of churches;" but bequests for religious and pious purposes have always been considered within the equity of the statute, and have always been upheld.¹ It may also be mentioned here that in England gifts for superstitious uses, that is, religious uses, which, according to the English ecclesiastical law, were illegal (as, for example, the maintenance of a priest to pray for the soul of the donor), were void. But in the United States there are no uses which can be denominated superstitious.² A trust, however, for an infidel society cannot be sustained.³

123. 4. Gifts for erecting or maintaining public buildings or works, or otherwise lessening the burdens of government;⁴ and under this head may be comprehended all trusts for the building or repair of bridges, ports, causeways, sea-banks, for paving, cleansing, and lighting a town, for erecting town houses, and bequests of a like character.⁵

It may be remarked here that when the subject of the trust is not the result of a gift, but of a contract or a statute, the use will not be a charitable one, for charity is necessarily based upon the idea of bounty, and cannot be predicated of an *agreement* to devote money to a benevolent object,⁶ or of an *assessment* under a statute.⁷

124. From the above statement of the objects which have been considered charitable uses, it will be perceived that it is a task of no little difficulty to give a definition of a charitable use which shall be at the same time accurate and comprehensive.

The definition given by Sir William Grant⁸ is that those purposes are considered charitable which are enumerated in the statute of 43 Elizabeth, or which, by analogy, are deemed within its spirit and intendment; but it has been justly re-

¹ Perry on Trusts, § 701.

² Methodist Church v. Remington, 1 Watts, 218; Gass v. Wilhite, 2 Dana, 175;

³ Miller v. Porter, 3 P. F. Sm. 292.

⁴ Zeisweiss v. James, 13 P. F. Sm. 465-471.

⁵ Jackson v. Phillips, 14 Allen, 556.

⁶ Coggeshall v. Pelton, 7 Johns. Ch. 292; Magill v. Brown, Brightly, 347;

Perry on Trusts, § 704; Thomas v. Ellmaker, 1 Pars. Eq. 98; Beaumont v. Oliveira, L. R., 4 Ch. App. 309.

⁷ Brendle v. The German Ref. Cong., 9 Casey, 419.

⁸ Att. Gen. v. Heelis, 2 Sim. & Stu. 77, per Sir J. Leach, V. C.

⁹ In Morice v. the Bishop of Durham, 9 Ves. 405.

marked that this definition leaves something to be desired in point of certainty, and suggests no principle.¹

Mr. Binney, in his great argument in the Girard Will Case, defined a charitable or pious gift to be "whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish."² And this definition has been approved by the Supreme Court of Pennsylvania.³ A more concise and practical rule is that of Lord Camden, adopted by Chancellor Kent, by Lord Lyndhurst, and by the Supreme Court of the United States—"a gift to a general public use, which extends to the poor as well as the rich."⁴ Mr. Justice Grey, in the Supreme Court of Massachusetts, in the case of *Jackson v. Phillips*, has defined a charity in its legal sense as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.⁵

This last definition, while not perhaps as concise as could be desired, is nevertheless both clear and comprehensive, and has already been adopted in text-books as the most satisfactory definition of a charitable use.⁶

125. The nature of a charitable use having been explained, it will be proper now to point out the principal characteristics of this trust, which have rendered it worthy of a separate consideration. These are, *first*, the uncertainty of its objects; and, *secondly*, the perpetuity of its existence. It has already been pointed out that the chief characteristic of charitable uses was

¹ *Jackson v. Phillips*, 14 Allen, 555.

² *Vidal v. Girard's Exrs.*, 2 Howard, 128.

³ *Price v. Maxwell*, 4 Casey, 35.

⁴ *Jones v. Williams*, Ambl. 652; *Cogge-*

shall v. Pelton, 7 Johns. Ch. 294; *Mitford v. Reynolds*, 1 Phil. Ch. 191, 192; *Perin v. Carey*, 24 How. 506.

⁵ 14 Allen, 555.

⁶ *Perry on Trusts*, § 697.

the fact that the objects of the trust were always, to a greater or less extent, uncertain;¹ and this characteristic of charitable uses has led to a doctrine peculiar to trusts of this sort, viz., that known as the *cy pres* doctrine.

126. The *cy pres* doctrine has been much discussed, if not a little severely criticized, and in many cases misunderstood. The very clear statement of the law upon this subject by Mr. Justice Grey in *Jackson v. Phillips*,² has done much to establish an accurate understanding of the doctrine.

The *cy pres* doctrine is one under which courts of chancery act, when a gift for charitable uses cannot be applied according to the exact intention of the donor. In such cases the courts will apply the gift, as nearly as possible (*cy pres*), in conformity with the presumed general intention of the donor; for it is an established maxim in the interpretation of wills, that a court is bound to carry the will into effect if it can see a general intention consistent with the rules of law, even if the particular mode or manner pointed out by the testator cannot be followed.³ Good illustrations of this doctrine will be found in the *Baliol College Case*,⁴ and in the *Ironmongers' Case*.⁵

127. Another instructive example may be found in the case of *Jackson v. Phillips*.⁶ There, one of the trusts in the will was for "the preparation and circulation of books and newspapers, the delivery of speeches, lectures, and such other means as in their (the trustees') judgment will create a public sentiment that will put an end to negro slavery in this country," and for "the benefit of fugitive slaves escaping from the slave-holding States." After the death of the testator, but while the litigation upon his will was in progress, the amendment to the Constitution of the United States abolishing slavery was adopted. The immediate purpose for which the bequest was designed having thus failed, the case was referred to a master to report a scheme, *cy*

¹ *Supra*, p. 127.

² 14 Allen.

³ *Jackson v. Phillips*, 14 Allen, 556; *Bartlet v. King*, 12 Mass. 543; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 117, 118; *Moggridge v. Thackwell*, 7 Ves. 69.

⁴ *Att. Gen. v. Guise*, 2 Vern. 266; *Att.*

Gen. v. Baliol Col., 9 Mod. 407; *Att. Gen. v. Glasgow Col.*, 2 Collyer, 665; 1 H. L. Cas. 800.

⁵ *Att. Gen. v. Ironmongers' Co.*, Cr. & Ph. 208.

⁶ 14 Allen, 571.

pres, for the application of the testator's bounty, and the fund was ultimately applied to the New England Branch of the American Freedmen's Union Commission.

128. The above cases will serve to illustrate the *cy pres* doctrine in its general aspect. In England, however, this doctrine appeared in two distinct shapes. It was in the first place applied in the exercise of a royal prerogative, delegated to the chancellor under the sign manual of the crown; and, in the second place, by the chancellor in the exercise of his ordinary equitable jurisdiction. By virtue of the first or prerogative power, the chancellor assumed to direct a scheme for the application of a charitable bequest when the particular charitable use designed by the testator was illegal, and therefore void, or when the gift was for an indefinite charitable purpose, and no trustees were named by the donor to carry it out.¹ Thus where a sum of money was bequeathed to a Jews' synagogue, which bequest, according to the law of England, was illegal, it was applied to the benefit of a foundling hospital. And a bequest for the education of poor children in the Roman Catholic faith has been disposed of by the king under his sign manual.² It is obvious that such an extravagant stretch of authority belongs to the executive rather than to the judicial department of government; but from the circumstance that this power was in England exercised by a judicial officer (the chancellor), it has come to be confounded with the purely judicial *cy pres* doctrine, and has necessarily tended to bring the latter into some disrepute.³ The judicial *cy pres* doctrine is not, in fact, open to the same objections as the extraordinary assumption of power just described, and within proper limits seems to be a reasonable exercise of judicial discretion. The doctrine is this: Where a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is ex-

¹ *Moggridge v. Thackwell*, 7 Ves. 83. See 1 Am. Law Reg. (N. S.) 400, 401.

² Story's Eq. Jurisp., § 1168.

³ The term *cy pres* has also been used to designate the rule of construction which has sometimes been applied to executory devises or powers of appointment to indi-

viduals, in order to avoid the objection of remoteness. It was this doctrine which has been condemned by Lord Kenyon and Lord Eldon. See *Brudenell v. Elwes*, 1 East, 451; Sugdon on Powers, ch. 9, sec. 9; *Jackson v. Phillips*, 14 Allen, 574.

pressed to limit it to a particular institution or mode of application; and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs-at-law as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible, to carry out his general charitable intent.¹ The doctrine as thus stated is well settled by the highest authority in England,² and has received the sanction of a decision in this country, in which the subject has been most thoroughly and ably considered.³

129. As already stated, this doctrine seems to be free from objection; for it will be observed that the doctrine thus stated avoids both of the extravagant conclusions to which the prerogative *cy pres* doctrine led. The gift, if for a charity generally, must be made to *trustees*, thus avoiding the mischief of turning the court into a trustee for a general charity;⁴ while, on the other hand, there must be no intention to limit the gift to a particular institution or mode of application, which avoids the obnoxious *cy pres* doctrine in those cases in which bequests were made to particular charitable uses, but which were applied by the exercise of the prerogative to different objects, because the use designated was illegal.

130. It is, nevertheless, true that the *cy pres* doctrine has in many cases in the United States been regarded with considerable disfavor.

¹ Jackson v. Phillips, 14 Allen, 586.

² Att. Gen. v. Guise, 2 Vern. 266; Att. Gen. v. Baliol Col., 9 Mod. 407; Att. Gen. v. Glasgow Col., 2 Collyer, 665; 1 H. L. Cas. 800. See also Bloomfield v. Stowmarket, Duke, 644; Att. Gen. v. Hicks, 3 Bro. C. C. 166, note; Att. Gen. v. Craven, 21 Beav. 392; Moggridge v. Thackwell, 7 Ves. 36; Att. Gen. v. The Ironmongers' Co., 2 My. & K. 576; 2 Beav. 313; Cr. & Ph. 208; 10 Cl. & Fin. 908; Att. Gen. v. Gibson, 2 Beav. 317, note.

³ Jackson v. Phillips, 14 Allen, 580, from which the statement of the doctrine in the text has been taken. See also

City of Philadelphia v. Girard's Heirs, 9 Wright, 28.

⁴ "Where money is given to charity generally," said Lord Eldon in Moggridge v. Thackwell, 7 Vesey, 36, "without trustees or objects selected, the king is constitutional trustee." In other words, the fund, in the absence both of trustees and definite objects, was applied at the pure will of the crown. It must be remembered, however, that where there is a charitable object pointed out, the trust will not be suffered to fail for want of a trustee. McGirr v. Aaron, 1 Penna. 49. See Perry on Trusts, § 722.

In *Fontain v. Ravenel*,¹ the Supreme Court of the United States seemed to be opposed to the *cy pres* doctrine; but in *Lorings v. Marsh*,² the tendency was, perhaps, the other way.

In North Carolina, Connecticut, Indiana, and Alabama, the *cy pres* doctrine has been repudiated.³ In Pennsylvania, although the principles of the statute of Elizabeth were said to have been adopted, the *cy pres* doctrine was rejected;⁴ but the doctrine to a limited extent was subsequently introduced by statute.⁵ In Maryland and Virginia, neither the statute of Elizabeth nor its principles are in force, and charities are treated as ordinary trusts;⁶ and the same conclusion has at last been reached in New York and South Carolina.⁷

But in many of the States, on the other hand, the *cy pres* doctrine has been received with more favor. In all of the New England States it has been either directly countenanced, or left an open question.⁸ In Missouri and Illinois, the doctrine has been approved.⁹ In New Jersey, the question has not been decided, although it has been said that a bequest which would be enforced in England, might not be carried into effect in that State, on the ground of the indefiniteness of its objects, or the impracticability of its exact execution.¹⁰

There seems, indeed, to be no valid reason why the judicial *cy*

¹ 17 Howard, 369.

² 6 Wallace, 337.

³ *McAuley v. Wilson*, 1 Dev. Eq. 276 (though, in the earlier case of *Griffin v. Graham*, 1 Hawks, 96, the tendency had been very much the other way); *White v. Fisk*, 22 Conn. 31; *Grimes v. Harmon*, 35 Ind. 198; *Carter v. Balfour*, 18 Alab. 814; though see *Williams v. Pearson*, 38 Alab. 307. In West Virginia, see *Venable v. Coffman*, 2 W. Va. 310.

⁴ *Witman v. Lex*, 17 Serg. & Rawle, 88.

⁵ Statute of 1855; *Brightly's Purdon's Dig.* 207. See, also, *Zeisweiss v. James*, 13 P. F. Smith, 465, where *Fontain v. Ravenel* is approved; *Philadelphia v. Girard's Heirs*, 9 Wright, 27.

⁶ *Dashiell v. Att. Gen.*, 5 Har. & J. 392; *Wilderman v. Baltimore*, 8 Maryl.

551; *State v. Warren*, 28 *Id.* 338; *Gallego v. Att. Gen.*, 3 Leigh, 450; *Baptist Association v. Hart's Exrs.*, 4 Wheat. 1.

⁷ *Bascom v. Albertson*, 34 N. Y. 584. *Pringle v. Dorsey*, 3 So. Car. (N. S.) 509. See, also, *Beekman v. Bonsor*, 23 New York, 308.

⁸ *Burr v. Smith*, 7 Verm. 287; *Brown v. Concord*, 33 N. Hamp. 296; *Jackson v. Phillips*, 14 Allen, 570; *Derby v. Derby*, 4 R. Island, 439; *Howard v. American Peace Soc.*, 49 Maine, 302.

⁹ *Academy v. Clemens*, 50 Missouri, 167; *Gilman v. Hamilton*, 16 Ill. 231.

¹⁰ *Thompson's Exrs. v. Norris*, 5 C. E. Green, 522. The point, however, was not before the court for decision in this case. See, also, *Att. Gen. v. Moor's Exrs.*, 4 C. E. Green, 503.

pres doctrine, as explained in *Jackson v. Phillips*, should not be approved in all those States wherein the statute of Elizabeth has been decided to be in force, or where its principles have been adopted by the law of the State; in other words, in those States where the doctrine that indefiniteness of the object is no objection to a trust, provided it is for a charity, is recognized. This is the case in many of the States of the Union.¹

131. While, however, the reasonable *cy pres* doctrine may be sustained, it is, nevertheless, true that many bequests for charitable purposes are, even in England, considered void by reason of uncertainty;² although it is submitted that when properly considered, the uncertainty which avoids the gift is not so much a vagueness in the charitable purpose, as an uncertainty whether the trustees are bound to apply the gift in charity at all. Thus, in *Ellis v. Selby*³ the gift was to trustees "to pay and apply the fund to and for such charitable or other purposes as they should think fit;" and it was held that the gift was void, because, from

¹ See *Vidal v. Girard*, 2 Howard, 128; *Perin v. Carey*, 24 Howard, 465; *Hadley v. Hopkins Academy*, 14 Pick. 240; *Going v. Emery*, 16 Pick. 107; *Treat's Appeal*, 30 Conn. 113; *Witman v. Lex*, 17 Serg. & Rawle, 88; *Zane's Will*, Brightly, 350; *Pickering v. Shotwell*, 10 Barr, 27; *Williams v. Pearson*, 38 Alab. 305; *McCord v. Ochiltree*, 8 Blackf. 15; *Beall v. Fox*, 4 Geo. 404; *Wade v. Am. Col. Soc.*, 7 S. & M. 663; *Dickson v. Montgomery*, 1 Swan (Tenn.) 348; *Urney's Exrs. v. Wooden*, 1 Ohio St. (N. S.) 160; *Johnson v. Mayne*, 4 Clarke (Iowa), 180; *Miller v. Chittenden*, *Id.* 252; *Preachers' Aid Soc. v. Rich*, 45 Maine, 552; *Trustees v. Chambers*, 3 Jones' Eq. 258; *Potter v. Thornton*, 7 R. Island, 252; *Meeting Street Baptist Soc. v. Hail*, 8 *Id.* 239; *Walker v. Walker*, 25 Georgia, 420; *Church v. Church*, 18 B. Mon. 635 (see Rev. Stats. of Kentucky, 1860, c. 14, § 1); *Chambers v. St. Louis*, 29 Missouri, 543; *Paschal v. Acklin*, 27 Tex. 173.

² Or because it is impossible to compel

the trustees to execute the gift, and it is out of the question, without such concurrence, to execute such gift at all. *New v. Bonaker*, L. R., 4 Eq. 655. In this case there was a bequest to the President and Vice-President of the United States and the Governor of Pennsylvania upon trust to build and endow a college for the instruction of youth in the State of Pennsylvania; and the testator directed that moral philosophy should be taught in the college, and that a professor should be engaged to inculcate and advocate the natural rights of black people, of every clime and country, until they should be restored to an equality of rights with their white brethren throughout the Union. The trustees having disclaimed, the court held that as they had no power to enforce the trust, they could not settle a charity *cy pres*.

³ 7 Sim. 352; 1 M. & Cr. 286; *Thomson v. Shakespeare*, Johnson, 612. See however, *Dolan v. MacDermot*, L. R., 3 Ch. 676.

the alternative nature of the bequest, it was not incumbent upon the trustees to apply the fund to *charitable* uses only. And although in several other cases in which this rule has been applied, the alternative nature of the gift has not been so apparent,¹ yet it is conceived that the true test to be applied is that suggested by Sir William Grant, in *Morice v. The Bishop of Durham*, viz., whether the property can consistently with the will be applied to other than charitable purposes; if it can, the trust is too indefinite.² But if the general charitable nature of the trust is imperative, and a trustee has been appointed, it is conceived that the better opinion now is, that such a trust will be carried out by the court in spite of the vagueness or uncertainty in the gift.³ It must be remembered, however, that it was decided in *Fontain v. Ravenel*,⁴ that when a discretion as to the application of the fund to charitable purposes had been vested in executors, and those executors died during the pendency of a prior life estate, the court would not exercise the discretion, and the gift would fail. And this rule seems to be approved in *Pennsylvania*.⁵

132. It sometimes happens that the particular charitable purposes specified or supposed to be contemplated by the testator do not exhaust the whole of the income of the property devoted by the will to charity. The general rule may be stated to be that if an intention can be gathered from the will to devote the whole to charity, the circumstance that the specific appropriation covers only a certain part, or that the estate afterwards becomes of a value more than sufficient to satisfy the requirements of the gift, will not create a resulting trust *pro tanto* for the heir or the next of kin, but that the surplus also will be devoted to the charitable purpose. This doctrine has existed since the time of Lord Coke, and is generally referred to as the rule in the *Thetford School Case*.⁶ In that case the testator, having land let at a rent of 35*l.* a year, bequeathed a sum

¹ *Williams v. Kershaw*, 5 Cl. & Fin. 111; *Morice v. The Bishop of Durham*, 9 Ves. 404; *Thomson's Exrs. v. Norris*, 5 C. E. Green, 489.

² 9 Ves. 404; see, also, *Rotch v. Emerson*, 105 Mass. 431.

³ *Saltonstall v. Sanders*, 11 Allen, 462; *McLain v. School Directors*, 1 P. F. Sm. 199; *Perry on Trusts*, § 712.

⁴ 17 How. 369.

⁵ *Zeisweiss v. James*, 13 P. F. Sm. 465.

⁶ 8 Rep. 130 b.

of 35*l.* a year "to the charitable uses hereinafter mentioned, that is to say," and then he said to the schoolmaster so much, to the usher so much, proportions of the whole. In the process of time, the rents increased to a greater yearly value than 35*l.*, and it was decided that the surplus also was to be appropriated to the charity.¹ However, if the testator, by the terms of the bequest, takes notice of the fact that the payments are less than the amount of the rents, there will be either a resulting trust, or the surplus will belong to the person to whom the estate is given, and by whom the payments are to be made.²

In this class of cases, however, it is difficult, and perhaps impossible, to lay down any general rule. The decision in each case must depend upon the instrument to be construed and the facts.³

133. Another characteristic of a charitable use which demands attention, is the fact that it is not subject to the ordinary rules in regard to perpetuities. Ordinarily, a perpetuity will no more be tolerated when it is covered with a trust than when it displays itself undisguised in a settlement of the legal estate,⁴ and therefore a perpetual trust cannot be created for an individual and his heirs in succession, forever.⁵ But when the trust is for a charity, it is no objection to it that the property may remain in the hands of the trustees and their successors for all time. Indeed, it is often one of the main objects of a gift to charity that the charitable use of the property should be perpetual; and moreover it must be remembered, that from this devotion to charitable uses, it does not necessarily follow that the property is never to be alienated, for the court can decree the sale of any trust property when the exigency of the case arises.⁶ In New York, however, trusts for charities, under the peculiar law of that State, are subject to the rules against perpetuities in the same way as ordinary trusts.⁷

¹ See, also, *Mayor of Beverly v. Att. Gen.*, 6 H. L. Cas. 318; *Att. Gen. v. Dean of Winsor*, 8 H. L. Cas. 369; *Girard v. Philadelphia*, 7 Wal. 1; *Att. Gen. v. Wax Chandlers' Company*, L. R., 8 Eq. 452; 2 *Redfield on Wills*, 796.

² *Mayor of Beverly v. Att. Gen.*, 6 H. L. Cas. 310; *Hill on Trustees*, 129.

³ *Perry on Trusts*, § 725.

⁴ *Lewin on Trusts*, 132; *Duke of Norfolk's Case*, 3 Ch. Cas. 20.

⁵ *Thellusson v. Woodford*, 4 Ves. 227; 11 Ves. 112.

⁶ *Perry on Trusts*, § 737.

⁷ *Levy v. Levy*, 33 N. York, 97; *Bascomb v. Albertson*, 34 *Id.* 584.

In general, trusts for accumulation beyond the period allowed by the common law, *i. e.*, a life or lives in being and twenty-one years afterwards, are void;¹ but in the case of trusts for charities, where there are no statutory regulations upon the subject, trusts for accumulation beyond the common law period are allowed.²

If, however, the charitable trust is not to vest until after the determination of a prior gift, and that prior gift may by possibility last longer than the time allowed by law, the gift over to charity will be void, because of the perpetuity in the first taker.³ Of course this rule would not apply when the first gift is to a charity.⁴

134. In England a conveyance or devise of real estate in trust for a charitable or public institution, being a *corporation*, is inoperative by the statute of mortmain unless sanctioned by a license from the crown.⁵ These statutes, however, are not in force and have not been adopted in the United States, and the English decisions upon this subject are therefore of no importance in this country.⁶

¹ Perry on Trusts, §§ 393, 394.

² See Odell v. Odell, 10 Allen, 1; City of Philadelphia v. Girard's Heirs, 9 Wright, 9. This last case is distinguished from the case of Hillyard v. Miller, 10 Barr, 326; Perry on Trusts, § 738.

³ Hillyard v. Miller, 10 Barr, 335; City of Philadelphia v. Girard's Heirs, 9 Wright, 29; Perry on Trusts, § 736.

⁴ Christ's Hospital v. Grainger, 16 Sim. 83; 1 MacN. & G. 460; McDonough v.

Murdoch, 15 Howard, 415; Potter v. Thornton, 7 R. I. 252; Perry on Trusts, § 736.

⁵ Hill on Trustees, 455.

⁶ 2 Kent's Com. 282. In Pennsylvania the statutes of mortmain were reported to be in force by the judges; see 3 Binney App. 626; but a contrary opinion has been subsequently expressed. Magill v. Brown, Brightly, 850; Vidal v. Girard's Exrs., 2 Howard, 128.

CHAPTER VI.

TRUSTEES; THEIR POWERS AND DUTIES.

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| 135. Jurisdiction of Courts of Equity over trustees.
136. Who may be a trustee; corporations.
137. Acceptance of the trust.
138. General duties of trustees.
139. Conversion of Securities; deposits.
140. Investments by trustees; English rule.
141. Rules in the United States.
142. When trustees are chargeable with interest. | 143. Trustee cannot use his position for his own advantage.
144. Compensation of trustees; difference between English rule and that in most of the United States.
145. Trustee cannot delegate his authority.
146. Responsibility for acts of co-trustee.
147. Remedies for breach of trust.
148. Trustees' Accounts. |
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135. THE general nature of a trust having been explained, and the different modes in which the relationship of trustee and *cestui qui trust* may arise having been pointed out, it will be proper now to proceed to a brief consideration of some of the rules by which the conduct of the holder of the legal title is governed, and by which his relations with co-trustees, with strangers, and with the *cestuis qui trust* are regulated. The promulgation and enforcement of these rules fall necessarily and properly within the jurisdiction of courts of equity, for it is but reasonable that those courts, after having called the equitable title into existence, should continue to exercise over it a constant care and supervision.¹ Equity affords this protection by appointing and removing trustees, by superintending their discharge of the duties of the trust, by regulating their liability, and finally by affording to the trustees, upon a proper application and upon proper cause shown, the advice and assistance of the court.

The manner in which courts of equity interfere for these purposes depends, at the present day, very much upon statutory regulations; and the liabilities and duties of trustees are also, in very many instances, governed by statutes, the details of which in the

¹ See *Dorsey v. Garey*, 30 Maryl. 489, 495.

different States, and in England, it would be quite impossible in a treatise like the present to explain. Nor is it possible to enter into a discussion of all the different duties which trustees are called upon to discharge, for they necessarily vary with the varied purposes for which trusts are created. They have been most elaborately examined in modern times in works devoted expressly to the subject. It is desirable, however, before leaving the consideration of the subject of trusts, that some of the more general questions connected with the jurisdiction of chancery over trustees should be noticed.

136. Any reasonable being may be a trustee; and a corporation, though it has but an artificial existence, may be a trustee for purposes germane to the objects of its corporate life.¹ The United States, and each one of the separate States, may sustain the character of trustees.² The only difficulty in such cases is the same as that which existed in England when the king was trustee, viz., in enforcing a decree of a court against the sovereign power.³ Gifts to unincorporated societies in trust for charitable purposes have been sustained in equity, although the decisions on this point have not been uniform.⁴ If a valid trust has been created, and no trustee has been appointed, or a trustee has been appointed who is incompetent to act, equity will appoint a trustee; for it is a cardinal maxim in courts of chancery upon this subject, that a trust shall never be suffered to fail for want of a trustee. Thus, if a corporation should be designated as a trustee, and the objects of the trust should be such that the corporation, from its very nature, would be incapable of carrying them out, a court of chancery will appoint a trustee who will be able to discharge the duties of the trust.⁵

¹ *Vidal v. Girard's Exrs.*, 2 How. 188, 190; *Girard v. Philadelphia*, 7 Wal. 1; *McDonough v. Murdoch*, 15 How. 367.

² *McDonough's Exrs. v. Murdoch*, 15 How. 367; *Case of the Smithsonian Institution*, cited in *Whicker v. Hume*, 7 H. L. Cas. 141; U. S. Stats., vol. v., p. 64; ix., p. 102.

³ See *New v. Bonaker*, L. R., 4 Eq. 655; *Hill on Trustees*, 50; *Perry on Trusts*, §§ 40, 41.

⁴ *Vidal v. Girard*, 2 How. 127; *Burbank v. Whitney*, 24 Pick. 146; *Magill v. Brown*, Brightly, 350; *Pickering v. Shotwell*, 10 Barr, 27; though see *Baptist Association v. Hart*, 4 Wheat. 1; *Perry on Trusts*, § 46.

⁵ *Vidal v. Girard (supra)*, *Sonley v. Clockmakers' Co.*, 1 Bro. Ch. 81; *Perry on Trusts*, § 45.

137. In cases of express trusts it is necessary that the trust should be accepted by the trustee, either expressly or impliedly; and whether there has been such an acceptance is a question of fact of a kind proper for the determination of a jury.¹ The best and most effectual method of accepting a trust is by signing the trust deed; but an acceptance may be equally inferred from any acts of the trustee in and about the execution of the trust.² If it is desired not to accept the trust, great care should be exercised not to do any act which might be construed into an acceptance. Even an instrument, drawn for the purpose of *disclaiming* a trust, has been construed to be an acceptance of it, because it was in the form of a conveyance, which was a dealing with the trust estate.³

138. The duties of trustees may be described, in the most general terms, to be to protect and preserve the trust property, and to see that it is employed solely for the benefit of the *cestui qui trust*. Thus, trustees for the payment of debts should see that all the assets are properly got in, that as much as possible is realized from them, that creditors are ascertained, their claims investigated, and the funds properly applied in the due payment of their demands. Trustees for sale are to see that a sale takes place within a reasonable time,⁴ that the property is disposed of on the most advantageous terms, that all means are used for the purpose of obtaining buyers and securing a fair sale, and that the purchase-money is collected. Trustees for charities must take care that the income is applied to the charitable purposes to which it was directed by the instrument creating the trust, and none other, and that the wishes of the donor are carried out consistently with the rules of law. In fine, it would be impossible to enumerate the duties which the multifarious purposes for which trusts are created impose upon the trustees—for to do so would be to write a work not upon the general principles of equity, but upon trusts.

139. The first general duty of trustees is to take possession of

¹ *Armstrong v. Merrill*, 14 Wal. 139.

² *Perry on Trusts*, § 260.

³ *Crewe v. Dicken*, 4 Ves. 97; *Urch v.*

Walker, 3 M. & C. 702; *Perry on Trusts*, § 271.

⁴ See *Walker v. Shore*, 19 Ves. 387;

Hunt v. Bass, 2 Dev. Eq. 297; *Morris v.*

Morris, 4 Jur. N. S. 802-964.

the trust property, to call in debts, and to convert securities. In converting securities they must exercise a sound discretion to sell in the most advantageous manner and at the most advantageous time.¹ They ought not to suffer trust property to remain in securities not authorized by law, unless there is something in the instrument creating the trust to justify such a course. As personal securities are not recognized by law as a proper investment, an executor should not allow the assets to remain outstanding in such securities, although the loan or investment had been made by the testator himself.² Of course there is no duty to convert securities, if by the terms of the trust instrument there is a sufficient indication that the *cestui qui trust* was intended to enjoy the interest, income, or dividends of the specific securities.³

After securities have been converted, the funds should be deposited in a proper place.

A trustee will not be liable for the failure of a bank in which trust funds have been deposited, if he has suffered them to remain there only for a reasonable time;⁴ but if he allows them to lie there by way of investment, he will be liable to make good their loss.⁵ But he must be careful to make the deposit in the name of the trust estate, and not to his own credit; and not to mix trust funds with his own, otherwise he will be liable.⁶

140. Supposing the trust property to have been converted into cash, the next duty of the trustee will be to see that the fund is

¹ Perry on Trusts, § 439.

² Powell v. Evans, 5 Ves. 839; Hempbill's Appeal, 6 Harris, 303; Pray's Appeal, 10 Casey, 100 (overruling Barton's Appeal, 1 Pars. Eq. 24); Kimball v. Reding, 11 Foster, 352; King v. Talbot, 40 New York, 76; Perry on Trusts, § 440; Hill on Trustees, 582 (4th Am. ed.).

³ Perry on Trusts, §§ 450, 451; Hill on Trustees, *ut sup.*

⁴ Rowth v. Howell, 3 Ves 565; Swinfen v. Swinfen (No. 5), 29 Beav. 211.

⁵ Rehden v. Wesley, 29 Beav. 213; Moyle v. Moyle, 2 R. & M. 710; Johnston v. Newton, 11 Hare, 160; Perry on Trusts, § 443.

⁶ Wren v. Kirton, 11 Ves. 377; McAllister v. Commonwealth, 4 Casey, 480; Jenkins v. Walter, 8 G. & J. 218; Luken's Appeal, 7 Watts & Serg. 48; Stanley's Appeal, 8 Barr, 431; Royer's Appeal, 1 Jones (Pa.), 36; De Jarnette v. De Jarnette, 41 Alab. 709; Perry on Trusts, §§ 443, 463. See also Frith v. Cartland, 2 Hen. & M. 417; Marine Bank v. Fulton Bank, 2 Wallace, 252; Kip v. the Bank of New York, 10 Johns. 65; Kennedy v. Strong, *Id.* 289; School, etc. v. Kirwin, 25 Ill. 73; Hill on Trustees, 575 (4th Am. ed.).

invested in proper securities, and in such a way that it may be made available for the purposes of the trust.

As courts of equity in England were in the habit of directing moneys which were in the custody of the court to be invested in 3l. per cent. annuities, it came to be considered an established duty on the part of trustees to invest trust moneys in those funds.¹ Several statutes, however, have been passed by which many other securities have been designated as lawful investments for trustees. Thus trustees are now allowed by act of parliament to invest in real securities in any part of the United Kingdom, and Bank of England, or Bank of Ireland, or East India Stock; unless such investments are expressly forbidden by the trust instrument.²

141. A trustee cannot invest the trust funds in personal securities; and even if they have a discretion as to investments, it is not a sound exercise of that discretion to invest in such securities. This is the rule in England and in the United States.³ So, also, for a trustee, in the absence of express authority, to employ trust funds in trade or speculation, will be a gross breach of trust.⁴ In England a trustee must not invest in bank stock or shares of public companies, and the rule is the same in New York and Pennsylvania.⁵ But in Massachusetts the rule is different.⁶

Mortgages on real estate are considered proper investments for

¹ Smith's Manual of Equity, 194. See *Brown v. Wright*, 39 Georgia, 26; *King v. Talbot*, 40 New York, 76.

² 22 and 28 Vic., c. 35, § 30; 23 and 24 Vic., c. 35, § 11; *Id.*, c. 145; 30 and 31 Vic., c. 132, § 1. See Hill on Trustees, 560 (4th Am. ed.).

³ *Walker v. Symonds*, 3 Swans. 81, note(a), citing *Ryder v. Bickerton* (where Lord Hardwicke said that "a promissory note is evidence of a debt, but not security for it"); *Adye v. Feuilliteau*, 1 Cox, 25; *Holmes v. Dring*, 2 Cox, 1; *Smith v. Smith*, 4 Johns. Ch. 281; *Nyce's Estate*, 5 Watts & Serg. 256; *Swoyer's Appeal*, 5 Barr, 377; *Wills's Appeal*, 10 Harris, 330; *Gray v. Fox*, Saxton (Ch.), 259; *Harding v. Larned*, 4 Allen, 426; *Clark*

v. Garfield, 8 Allen, 427; *Moore v. Hamilton*, 4 Flor. 112; *Spear v. Spear*, 9 Rich. Eq. 184 (see, however, *Nance v. Nance*, 1 S. Carolina (N. S.), 209); *Barney v. Saunders*, 16 Howard, 545; *Perry on Trusts*, § 453.

⁴ *Perry on Trusts*, § 454. See *Poole v. Munday*, 103 Mass. 174, for an exceptional case where the rule was not enforced.

⁵ *Ackerman v. Emott*, 4 Barb. 626; *Hemphill's Appeal*, 6 Harris, 303; *Worrell's Appeal*, 10 Harris, 44; *Perry on Trusts*, § 456; *Hill on Trustees*, 578 (4th Am. ed.).

⁶ *Harvard Coll. v. Amory*, 9 Pick. 446; *Lovell v. Minot*, 20 Pick. 116; *Perry on Trusts*, § 456.

trustees in the United States, and in England the investment in such securities is now authorized by statute.¹

In several of the United States the subject of investments by trustees is expressly regulated by statute.²

142. A trustee is chargeable with interest on balances that he improperly retains in his hands, and sometimes with compound interest.³ Moreover, if a trustee is directed by the trust instrument to invest in a particular stock, and neglects to do so, the *cestui qui trust* has his election to take the money and legal interest thereon, or so many shares of stock as the money would have purchased at the time when the investment ought to have been made, and the dividends on the same.⁴ And so, if a trustee embarks the trust funds in business, the *cestui qui trust* may take either the amount with interest, or the profits of the business.⁵

143. It is one of the fundamental principles of trusts, that a trustee cannot use his position as a trustee for his own advantage in any way. He must have an eye single to the interests of the *cestui qui trust*. The rule in the Rumford Market case, and similar cases already noticed under the head of Constructive Trusts, are illustrations of the strictness with which this rule is enforced.⁶ A trustee cannot make any profit at the expense of the trust estate; he cannot use trust funds for his own benefit; he cannot buy in trust property for himself at his own sale, nor can he buy up any debt, charge, or encumbrance to which the trust estate is liable, at less than is actually due thereon, and then collect the full amount from the estate.⁷ And it has been held in many

¹ Perry on Trusts, §§ 457, 458; Stat. 22 and 28 Vic., c. 35 (Lord St. Leonard's Act).

² Perry on Trusts, § 459.

³ See Penny v. Avison, 3 Jur. (N. S.) 62; Bruner's Appeal, 7 P. F. Smith, 46.

⁴ Shepherd v. Moul, 4 Hare, 504; Robinson v. Robinson, 1 De G. M. & G. 256; Byrchall v. Bradford, 6 Mad. 285; Perry on Trusts, § 469. See, also, McIntire v. Zanesville, 17 Ohio St. 352, and Lamb's Appeal, 8 P. F. Sm. 142.

⁵ Jones v. Foxall, 15 Beav. 392; Robnett's Appeal, 12 Casey, 174; Kyle v. Barnett, 17 Alab. 306; Barney v. Saun-

ders, 16 How. 543; McKnight's Exrs. v. Walsh, 8 C. E. Green, 146; Perry on Trusts, § 470. See Whitney v. Smith, L. R. 4 Ch. App. 513.

⁶ Ante, p. 103. See, also, Blauvelt v. Ackerman, 5 C. E. Green, 141; Washington R. R. Co. v. Alexandria R. R. Co., 19 Grat. 592; Boerum v. Schenck, 41 N. Y. 182.

⁷ Burgess v. Wheate, 1 Eden, 226; Sugden v. Crossland, 3 Sm. & Gif. 192; Robinson v. Pett, 3 P. Wms. 251, n.(a.); Michoud v. Girod, 4 Howard, 503; Pooley v. Quilter, 4 Drew. 184; 2 De G. & Jo.

cases that a trustee may not even purchase the trust property at a judicial sale, brought about by a third party, and which he had taken no part in procuring;¹ although upon this point there are several authorities the other way.² Contracts between a trustee and *cestui qui trust may* be made, but they are scrutinized by the courts with great severity.³

144. The rule that a trustee can obtain no benefit whatever from his position, was in England carried to the extent of holding that he was not even entitled to compensation or allowance for his trouble and responsibility in the care and management of the trust estate, unless they were expressly allowed in the trust instrument;⁴ and this rule applies also to executors, guardians, receivers, directors of corporations, and in general to all fiduciaries.⁵ But this rule has not been adopted in the United States; and trustees and other fiduciaries in this country are entitled to a reasonable compensation for their services.⁶ The *amount* is in some States fixed by statute, and in others regulated by the court to which the trustees are liable to account.⁷ The English rule in regard to commissions, was cited with approval by Chancellor Kent, in two early cases in New York;⁸ but the only States in which it is now followed appear to be Delaware,⁹ Ohio,¹⁰ and Illinois.¹¹

327; *Shoemaker v. Van Wyck*, 31 Barb. 457; *Herr's Estate*, 1 Grant (Pa.), 272; *Barksdale v. Finney*, 14 Grat. 338; *Green v. Winter*, 1 J. C. R. 27.

¹ *Obert v. Obert*, 1 Beas. 428; *Ricketts v. Montgomery*, 15 Maryl. 46; *Jamison v. Glascock*, 29 Missouri, 191; *Bank v. Dubuque*, 8 Clarke (Ia.), 277; *Elliott v. Pool*, 3 Jones Eq. 17; *Campbell v. Johnson*, 1 Sand. Ch. 148; *Chandler v. Moulton*, 33 Verm. 245; *Martin v. Wynkoop*, 12 Ind. 266; *Ogden v. Larrabee*, 57 Ill. 889.

² *Prevost v. Gratz*, 1 Pet. C. C. 364; *Fisk v. Sarber*, 6 Watts & Serg. 18; *Chorpenning's Appeal*, 8 Casey, 315; *Elrod v. Lancaster*, 2 Head, 571; *Mercer v. Newcum*, 23 Georgia, 151; *Huger v. Huger*, 9 Rich. Eq. 217; *Earl v. Halsey*, 1 McCart. 332; *Hill on Trustees*, 249, 250,

note (4th Am. ed.); *Note to Fox v. Macreth*, 1 Lead. Cas. Eq. 216, 217 (3d Am. ed.). See *ante*, p. 106.

³ *Perry on Trusts*, § 428. *Post*, Part II. Chap. II. Sec. III.

⁴ *Robinson v. Pett*, 3 P. Wms. 251; 2 Lead. Cas. Eq. 206, and notes.

⁵ *Perry on Trusts*, § 904. Notes to *Robinson v. Pett*, *supra*.

⁶ Notes to *Robinson v. Pett*, 2 Lead. Cas. Eq. 206; *Perry on Trusts*, § 916.

⁷ See *Perry on Trusts*, § 918, notes, where the authorities and statutes are collected.

⁸ *Green v. Winter*, 1 Johns. Ch. R. 37; *Manning v. Manning*, *Id.* 534.

⁹ *Egbert v. Brooks*, 3 Harring. 112; *State v. Platt*, 4 *Id.* 154.

¹⁰ *Gilbert v. Sutliff*, 3 Ohio St. 149.

¹¹ *Constant v. Matteson*, 22 Ill. 546.

In England, however, trustees are allowed for their expenses reasonably and properly incurred in the execution of the trust;¹ and it need hardly be added that the same rule exists in the United States.² Allowances to trustees are, however, in the discretion of the court; and even the expenses of a trustee will not be reimbursed if they have been incurred unnecessarily, and against the remonstrances of the *cestui qui trust*.³

145. The position of trustee is one of personal confidence, and he cannot, therefore, delegate his office even to a co-trustee.⁴ A trustee may, however, employ a steward, agent, or attorney in cases where it is usual to do so in the ordinary course of business;⁵ and one of several trustees may be such agent.⁶

146. Questions have frequently arisen as to the responsibility of a trustee for the acts of his co-trustee, and how far he is liable for money for which he has joined in giving a receipt, but which has been actually paid into the hands of a co-trustee, and lost.

The general principle which governs cases of this description seems to be, that a trustee will be required to act in regard to the trust estate with the same diligence and care which a careful man displays in the conduct of his own affairs,⁷ to exercise good faith, and not to connive or in any way aid any bad faith on the part of a co-trustee; but he is not required actively to unite with his co-trustee in everything which is done in the administration of the trust.⁸ The rule is, that a trustee is generally

¹ Perry on Trusts, § 910; Hill on Trustees, 574.

² Green v. Winter, 1 Johns. Ch. 37; Towle v. Mack, 2 Verm. 19; McElhenny's Appeal, 10 Wright (Pa.), 347.

³ Berryhill's Appeal, 11 Casey, 245; Walker v. Walker, 9 Wal. 743.

⁴ Hawley v. James, 5 Paige (Ch.), 487; Pearson v. Jamison, 1 McLean, C. C. 197.

⁵ Ex parte Belchier, Amb. 219; Hawley v. James, 5 Paige (Ch.), 487; May v. Frazee, 4 Lit. 391; Telford v. Barney, 1 Iowa, 591; Blight v. Schenck, 10 Barr, 285; Lewis v. Reid, 11 Ind. 239; Mason v. Wait, 4 Scam. 197; Abbott v. Rubber

Co., 33 Barb. 579; Sinclair v. Jackson, 8 Cowen, 543; Webb v. Ledsam, 1 K. & J. 385; Leggett v. Hunter, 19 N. Y. 445; Bowen v. Seeger, 3 W. & S. 222. It seems to be unsettled exactly how far trustees are responsible for money collected by an attorney-at-law, whom they have employed. See Perry on Trusts, § 405.

⁶ Ex parte Rigby, 19 Ves. 463.

⁷ Neff's Appeal, 7 P. F. Sm. 91; Jones's Appeal, 8 W. & S. 150; Davis v. Harman, 21 Grat. 200. See Sutton v. Wilders, L. R. 12 Eq. 873.

⁸ Ochiltree v. Wright, 1 Dev. & Bat. Eq. 336; Ray v. Doughty, 4 Blackf. 115.

not responsible for the conduct of his co-trustee. Upon this subject the leading authorities are the cases of *Townley v. Sherbourne*,¹ and *Brice v. Stokes*.² In the first of these cases it was resolved that where lands or leases are conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and afterwards dies or becomes insolvent, his co-trustee shall not be charged or be compelled to answer for the receipt of him so dying or becoming insolvent, unless some fraud or evil dealing appear to have been in them to prejudice their trust. The reason of this decision is, that, trustees being by law joint tenants, every one is equally entitled to receive the rents. In *Brice v. Stokes*³ the trustee was, under the particular circumstances of the case, made responsible for money for which he had joined in a receipt, although the amount had not been actually received by him; but the general rule (which has since been acted upon) was laid down by Lord Eldon to be, that at law, where trustees join in a receipt, *primâ facie* all are to be considered as having received the money; but that it is competent to a trustee, and, if he means to exonerate himself from that inference, it is necessary, for him to show that the money acknowledged to have been received by all was in fact received by one, and the other joined only for conformity.⁴

But while it is true, as a general rule, that a trustee shall not be liable for the acts or defaults of his co-trustee, yet any fraud or improper dealing or gross negligence on the part of a trustee (as, for example, if he were to stand by and see a breach of trust committed by his co-trustee), will render him responsible.⁵ As soon as a trustee is fixed with knowledge that a co-trustee is misapplying the money, a duty is imposed upon him to bring it

¹ *Bridg.* 35; 2 *Lead. Cas. Eq.* 858 (4th Eng. ed.).

² *Brice v. Stokes*, 11 *Ves.* 319; 2 *Lead. Cas. Eq.* 865.

³ See 2 *Lead. Cas. Eq.* 865, and notes; *Bowers v. Seeger*, 8 *W. & S.* 222; *Sinclair v. Jackson*, 8 *Cow.* 543; *Peter v. Beverly*, 10 *Peters*, 562; 1 *How.* 134; *Taylor v. Benham*, 5 *How.* 233; *Perry on Trusts*, § 417.

⁴ See *Kip v. Deniston*, 4 *Johns. R.* 23.

⁵ See *Mucklow v. Fuller*, *Jac.* 198; *Booth v. Booth*, 1 *Beav.* 125; *Styles v. Guy*, 1 *MacN. & G.* 422; *Taylor v. Roberts*, 3 *Alab.* 86; *Worth v. McAden*, 1 *Dev. & Bat. Eq.* 199; *Latrobe v. Tiernan*, 4 *Maryl. Ch.* 474; *Monell v. Monell*, 5 *Johns. Ch.* 283; *Irwin's Appeal*, 11 *Casey*, 294; *Ducommun's App.*, 5 *Harris (Pa.)*, 268; *Clark v. Clark*, 8 *Paige*, 153; *Mary Evans's Est.*, 2 *Ash.* 470.

back into the joint custody of those who ought to take better care of it.¹ And although a trustee (according to the rule laid down by Lord Eldon in *Brice v. Stokes*) may not be liable by joining in a receipt, yet, if (as in that case) the transaction is unnecessary, and he permits his co-trustee to keep and deal with the trust moneys contrary to the trust, he will be charged with any loss which may have occurred.²

When a number of trustees are appointed, they constitute (so to speak) but one trustee, and hence in any business of the trust they must all concur;³ but this rule does not apply to the case of public trusts in which the acts of a majority are binding.⁴

147. When a breach of trust has been committed, the remedy of the injured party is twofold, *first*, by holding the trustees or (in case of their death) their representatives responsible; and, *secondly*, by removal of the trustees.

Trustees who have committed a breach of trust, or their representatives, cannot set up the statute of limitations;⁵ but the remedy of the *cestuis qui trust* may be barred by concurrence, acquiescence, or executing a release, providing they are not under any disability, such as infancy, coverture, or the like.⁶

Upon proper cause shown, a court of equity will remove a trustee.⁷

A trustee is entitled to come into equity for the purpose of obtaining the advice and assistance of the court in the execution of his trust.⁸

148. A trustee may have his accounts investigated by the court; and, on the other hand, he is bound to render proper accounts

¹ 1 Sug. V. and P. 93 (8th Am. ed.); *Wayman v. Jones*, 3 Maryl. Ch. 506. the *cestui qui trust* in asserting his rights. *Bright v. Legerton*, 2 De G. F. & J. 606.

² *Thompson v. Finch*, 22 Beav. 316; See, also, *Hunter v. Hubbard*, 26 Tex. 537; *New Market v. Smart*, 45 N. Hamp. 87; *Smith v. Drake*, 8 C. E. Green, 805.

³ 3 De G. M. & G. 560; *Mendes v. Guedella*, 2 J. & H. 259; *Clark v. Clark*, 8 Paige, 152; *Wayman v. Jones*, 4 Maryl. Ch. 500; *Elmendorf v. Lansing*, 4 Johns. Ch. 562; *Ringgold v. Ringgold*, 1 H. & Gill, 11; *Jones's App.*, 8 Watts & Serg. 147; *Edmunds v. Crenshaw*, 14 Pet. 166. ⁶ 2 Lead. Cas. Eq. (4th Eng. ed.) 916, 919. The disability of coverture does not protect the separate estate of a married woman; *Clive v. Carew*, 1 Johns. & H. 199.

⁵ *Perry on Trusts*, § 411.

⁴ *Perry on Trusts*, § 413.

⁵ They can set up the negligence of

⁷ *Perry on Trusts*; *Hill on Trustees*. 298 (4th Am. ed.).

⁸ *Hill on Trustees*, 543.

when summoned to do so.¹ And a trustee who has committed a breach of trust is liable to account to the *cestui qui trust* for the amount of the trust funds which have been misapplied, with interest; or for the profits which he has made. In other words, it is a cardinal principle in the management of a trust, that the trustee may lose, but cannot gain.

CHAPTER VII.

MORTGAGES.

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| 149. The law of Mortgages no longer peculiar to Equity.
150. Nature of a Mortgage; origin of Equity of Redemption.
151. Nature of the Equity of Redemption; limitations.
152. Nature of Mortgagor's title in England; in the United States.
153. Once a mortgage, always a mortgage.
154. Distinction between mortgages and conditional sales. | 155. Absolute deed may be shown to be a mortgage.
156. Foreclosure suits.
157. Rights and duties of mortgagor and mortgagee.
158. Tacking.
159. Mortgages to secure future advances.
160. Merger sometimes prevented in Equity.
161. Equitable mortgages to be considered under Liens. |
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149. THE title which the court of chancery called into being for the purpose of preserving the rights of a *cestui qui trust* as against a trustee has been considered, and its origin, its mode of creation, its incidents, and the duties to which it gives rise have been discussed. The next *title* originally recognized solely in courts of equity, which requires notice, is that which grows out of the relation of mortgagor and mortgagee, and it will be desirable to consider in this connection, not only the equitable title itself, but also a few of those rights and duties which are connected with this relation. This consideration, however, must necessarily be brief, for to enter at large into a discussion of all the points which arise out of the interesting subject of mortgages, would be to go somewhat outside of the present jurisdiction of courts of equity.

¹ *Pearse v. Green*, 1 J. & W. 135; *Freeman v. Fairlie*, 3 Meriv. 24, 42.

The subject of mortgages, indeed, is one which, in modern times, might justly fall within the scope of a treatise on common law, rather than of one which professes to deal with the extraordinary jurisdiction of the High Court of Chancery; because the rights of the mortgagor are now so thoroughly recognized in courts of law, that their former precarious condition has become a matter of history rather than one of practical importance. But this condition of things serves only to justify the remark made by Chancellor Kent, that "the case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and of the homage which these principles have received by their adoption in courts of law."¹

Besides, while in many States of the Union the peculiarity of the relation of mortgagor and mortgagee has disappeared under the levelling influence of legislative enactments, in others it still remains, while in all of the United States, a knowledge of the history of mortgages is necessary to a philosophical understanding of the rules by which they are governed.

150. The jurisdiction of equity upon the subject of mortgages arose principally from two sources:—

First, the harshness with which the common law treated the mortgagor; and second, the inadequacy of relief which that system of jurisprudence afforded to the mortgagee.

As is well known, a mortgage was a conveyance of land sometimes in fee, and sometimes for a less estate, with a stipulation called a clause of defeasance,² by which it was provided that in case a certain sum of money were paid by the feoffor to the feoffee, on a day named, the conveyance should be void, and the estate should either, by virtue of the defeasance, revest in the feoffor, or he should be entitled to call upon the feoffee for a reconveyance of the same. The person who borrowed the money and conveyed the estate was called the mortgagor, and the other party to the contract and conveyance was the mortgagee. The term *mortgage* is derived from the *mortuum vadium*, or dead pledge of the civil law; because after the forfeiture was completed by the non-payment of the money, the estate was then

¹ 4 Kent's Com. 158.

² The defeasance may be in a separate instrument, 4 Kent. Com. 41.

dead to the mortgagor. Mortgages are classed by Littleton among estates upon condition. The fee vested in the mortgagee from the date of the conveyance, subject to the condition of being defeated by the performance of the stipulation on the part of the mortgagor. On the other hand, if the condition were broken, in other words, if the money was not paid, the estate in the mortgagee then became absolute, and the mortgagor lost his property altogether.¹

As the estate conveyed was very frequently, if not always, greater in value than the debt which the conveyance was intended to secure, the strict common law construction of conditions broken, and the enforcement of forfeitures thereupon, necessarily occasioned much hardship. If the mortgagor was not prepared on the day to pay the amount due, the estate became absolute in the mortgagee, and no subsequent tender or payment could operate to revest the title in the mortgagor, or entitle him to any relief in a court of law. On one side of Westminster Hall he was entirely without remedy. On the other side, however, the court of chancery interfered for his relief. It was considered in equity that as the mortgage was, in point of fact, only a pledge for a debt, the payment of the debt, together with a penalty for the delay, in other words, interest, ought to entitle the debtor to have his property back again; that is to say, equity recognized the mortgagor's right to redeem. Hence arose that privilege on the part of the mortgagor, which has been so long inseparably connected with mortgages, and which is known as the equity of redemption. It was a right not recognized at common law, but only in chancery, and hence was called an "equity;" it was a right to buy back the land pledged, and hence was termed "redemption."

This right of the mortgagor was recognized as early as the reign of Queen Elizabeth.²

151. In *Roscarrick v. Barton*³ it was said that the equity of redemption was a mere *right*, as distinguished from an *estate*; but in the leading case of *Casborne v. Scarfe*,⁴ Lord Hardwicke

¹ Co. Litt. § 332.

³ 1 Ch. Cas. 217.

² *Langford v. Barnard, Tothill*, 134.

⁴ 1 Atk. 603; 2 Lead. Cas. Eq. 1035

See, also, *Emmanuel Col. v. Evans*, 1 Ch. (4th Eng. ed.).

Rep. 18.

decided that it was an *estate*, "for," said he, "it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seizin." This view of the equity of redemption has been particularly observed in the United States, where a mortgage is looked upon as a mere security for the debt, and the title is considered, for most purposes, as remaining in the mortgagor.¹

This equity of redemption was, however, limited in point of time. It would have been obviously unjust to allow a mortgagor, or persons claiming under him, an unlimited option to redeem, no matter how many years might have elapsed since the date of forfeiture. The statute of limitations, as to real estate, furnished a convenient standard by which the duration of this right was to be measured; and it was held that after twenty years from the time of forfeiture, the mortgagee's right to redeem was forever gone.²

By analogy to the exceptions in the statute, ten years additional were allowed after the removal of the impediments of infancy, coverture, imprisonment, or absence beyond the seas.³

This equity of redemption existed not only in favor of the mortgagor, but also of other parties claiming under him. Thus the heir, the devisee, or the alienee (even though a volunteer), of the mortgagor, may redeem.⁴ So, also, may a subsequent mortgagee,⁵ a judgment creditor,⁶ or the crown, or lord of the fee,

¹ 4 Kent's Com. 160; 2 Wash. on Real Prop. 151.

² Anon., 3 Atk. 313; Phillips v. Sinclair, 20 Maine, 269; De Marest v. Wynkoop, 3 Johns. Ch. 129; Gates v. Jacob, 1 B. Mon. 308; 2 Sug. V. and P. 109 (8th Am. ed.).

³ 1 Lead. Cas. Eq. 1065 (4th Eng. ed.). In England the limitation of the right of redemption is now fixed at twenty years by statute 3 and 4 Wil. IV., c. 27, § 28; unless in the mean time an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been

given in writing, signed by the mortgagee or the person claiming through him.

⁴ Pym v. Bowreman, 3 Swanst. 241, n.; Lloyd v. Wait, 1 Ph. 61; Lewis v. Nangle, 2 Ves. 481; Rand v. Cartright, 1 Ch. Ca. 59. See Beach v. Shaw, 57 Ill. 17; Smith v. Manning's Exr., 9 Mass. 422; Beach v. Cooke, 28 N. Y. 508.

⁵ Fell v. Brown, 2 Bro. C. C. 276.

⁶ Stonehewer v. Thompson, 2 Atk. 440; Mildred v. Austin, L. R., 8 Eq. 220; Hitt v. Holliday, 2 Litt. 332; Dabney v. Green, 4 Hen. & Munf. 101; Bigelow v. Willson, 1 Pick. 485.

on forfeiture.¹ A tenant for life, a remainderman, a reversioner, a tenant by the curtesy or by devise, and a jointress may all redeem.²

And this right may, of course, be exercised not only against the mortgagee, but against any person claiming under him.

152. The nature of the mortgagor's title has been the subject of some discussion both in England and in the United States. In the case of a mortgage there was an equitable title given by the court of chancery distinct from the coexisting legal title; and in this respect, therefore, the relation of mortgagor and mortgagee resembled that of trustee and *cestui qui trust*; but while the two relations had this characteristic in common, they were by no means identical.³ It has been truly said that the relation of mortgagor and mortgagee is one which is perfectly anomalous and *sui juris*;⁴ and that while the relation of vendor and purchaser, of principal and bailiff, of landlord and tenant, of debtor and creditor, and of trustee and *cestui qui trust*, have been used to describe the relation of mortgagor and mortgagee, yet by the names of mortgagor and mortgagee alone can that relation be properly characterized.

It had been decided in England that the equity of redemption of an estate in fee simple, prior to the statute of 3 and 4 Wil. IV., c. 104, was an equitable and not a legal asset;⁵ but this did not necessarily determine the equitable nature of the estate itself; for it was pointed out by Vice-Chancellor Kindersley, in *Cook v. Gregson*,⁶ that the term equitable assets referred not to the nature of the property in the hands of the executor, but to the remedy by which the assets could be reached by the creditors of the decedent. And it was decided, in that case,⁷ that the equity of redemption of a sum of money charged on land was legal assets in the hands of the executor—for he could recover it merely *virtute officii* as executor, which was said to be the test.

¹ *Att. Gen. v. Crofts*, 4 Bro. P. C. 136; *Downe v. Morris*, 3 Hare, 394.

² *Ravald v. Russell*, 1 You. 9; *Raffety v. King*, 1 Keen, 618; *Aynsly v. Reed*, Dick. 249; *Palmer v. Danby*, Prec. Ch. 137; *Jones v. Meredith*, Bunb. 347; *Howard v. Harris*, 1 Vern. 190.

³ 1 Spence Eq. 432.

⁴ *Cholmondeley v. Clinton*, 2 Jac. & Wal. 182, 183.

⁵ It is now made a legal asset by that statute.

⁶ 3 Drew, 547.

⁷ *Id.*

But that the estate of the mortgagor is to be regarded in England as an equitable and not a legal title, is evident from the circumstance that a second mortgage of the same estate is always considered as the transfer of an equitable and not of a legal title, and therefore is to be subject to the rules by which the assignments of equitable interests are governed.¹

In the United States, however, the nature of the mortgagor's interest is of a legal rather than an equitable character, at all events so far as regards third persons. The mortgagor may bring an action at law to recover the land; his estate is liable to dower, and may be taken in execution for his debts.²

But as between the mortgagor and mortgagee the legal title passes by the mortgage, and the mortgagee has a right to recover in ejectment. This is the English rule, and the same doctrine has been adopted in many of the United States. In others, however, the mortgage is considered as creating a lien merely, and giving no title upon which an ejectment can be sustained.³

Both in England and in this country the interest of the mortgagee is considered as personal property, and goes to the executor and not to the heir.⁴

153. The equity of redemption would have rested upon a very slender and precarious foundation, if it could have been waived, surrendered, or bargained away by the mortgagor at the time of the creation of the mortgage; because the same necessity which drove him into the position of borrower, would also have inevi-

¹ See *post*, Chap. VIII., Assignments. Notes to *Thornborough v. Baker*, 2 Lead. Cas. Eq. 1030 (4th Eng. ed.); and to *Marsh v. Lee*, 1 *Id.* 611.

² American note to *Thornborough v. Baker*, 3 Lead. Cas. Eq. 647; *Brobst v. Brock*, 10 Wallace, 529; *Hutchins v. King*, 1 Wallace, 58; *Wilkins v. French*, 20 Maine, 111; *Jackson v. Willard*, 4 Johns. 41; *Ellison v. Daniels*, 11 N. Hamp. 274; *Hitchcock v. Harrington*, 6 Johns. 295; *Norwich v. Hubbard*, 22 Conn. 587; *Carpenter v. Bowen*, 42 Miss. 28; *Woods v. Hilderbrand*, 46 Missouri, 284; *Hale v. Horne*, 21 Grat. 121; *Wil-*

liams v. Beard, 1 S. Carolina (N. S.), 824; *Jackson v. Lodge*, 36 Cal. 28; *Buckley v. Daly*, 45 Miss. 338; *White v. Rittenmyer*, 30 Iowa, 268; *Gorham v. Arnold*, 22 Mich. 250; 2 Wash. on Real Prop. 155.

2 Washburn on Real Prop. 100.

⁴ *Thornborough v. Baker*, 1 Ch. Ca. 283; 2 Lead. Cas. Eq. 817. A conveyance of the mortgaged premises by the mortgagee, without assigning the debt, passes no estate. *Johnson v. Cornett*, 29 Ind. 59; *Hubbard v. Harrison*, 38 Ind. 341; 4 Kent. Com. 194.

tably compelled him to submit to any terms or stipulations, however harsh, which the lender of the money chose to insist upon. The right to redeem would therefore have been given up, in favor of the mortgagee, and thus have been rendered of little practical value, if equity had not again interfered for the protection of the debtor. It was, consequently, at an early date determined, and it is a settled and fundamental doctrine in the law of mortgages, that the mortgagor cannot by any stipulation or agreement made in the mortgage instrument, or at the date of its execution, waive or surrender his right to redeem within the twenty years.¹ No matter how rigidly he may attempt to bind himself, and no matter how stringent may be the contract by which the equity of redemption is to be given up, and the estate is to become absolutely the property of the mortgagee in the event of a forfeiture, a court of chancery will utterly disregard any such agreement, and will hold the mortgagor still capable of exercising this inalienable right of redeeming his property upon payment of the principal and interest of the mortgage debt.

So deeply rooted is this doctrine, that it has taken the shape of a maxim, and the immutable character of the mortgagor's right is expressed in the emphatic phrase "once a mortgage always a mortgage." A man may, of course, sell his equity of redemption the day after the mortgage is created, if he chooses so to do;² but he cannot by any form of language, part with it in favor of the mortgagee at the instant of the creation of the mortgage.³

154. The care which equity takes to call into being and preserve the right of redemption is shown in the tendency which exists in courts of chancery (and in courts of law where equitable doctrines are recognized) to construe alleged conditional sales to be, in fact, mortgages. A sale coupled with a stipulation or

¹ Howard v. Harris, 1 Vern. 190 (2 Lead. Cas. Eq. 869), decided in 1683.

² Although such a transaction is closely scrutinized in equity, and its fairness must distinctly appear; Holdridge v. Gillespie, 2 Johns. Ch. 34; Russell v. Southard, 12 Howard, 154; Webb v. Rorke, 2 Sch. & Lef. 673.

³ Johnston v. Gray, 16 S. & R. 365; Clark v. Henry, 2 Cow. 324; Stover v. Bounds, 1 Ohio St. 107; Pritchard v. Elton, 38 Conn. 434; McNees v. Swaney, 50 Miss. 391. Notes to Thornborough v. Baker (*supra*); 2 Wash. Real Prop. 67.

condition that the vendor shall be at liberty to buy back the property within a certain time, is not forbidden by law, and when such a contract is made the parties must abide by it, and the original vendor has no right to insist upon a resale to himself at any day after the stipulated time. But when the transaction is in substance a security for a debt, and when there is sufficient evidence to show that *that* was the real intention of the parties, it is obvious that the nature of the contract is that of a mortgage, and not of a sale with the privilege of buying back. The mere fact, therefore, that the transaction has assumed the shape of a conditional sale will not be allowed to alter the rights of the parties, or deprive the party, who is in fact, though perhaps not in name, a mortgagor, of his equity of redemption. The difficulty in most cases is to ascertain what the actual nature of the transaction was intended by the parties to be. Each case must, of course, to a great extent, depend upon the circumstances peculiar to itself: but there are certain *indicia* of intention which frequently occur, and which when they do exist are always looked to. Among these are the sufficiency or insufficiency of the price paid; whether or not existing securities or evidences of indebtedness were given up or cancelled; whether there was any obligation to repay the purchase-money; and whether the grantee entered into immediate possession of the premises.¹

Whatever difficulty there may be in determining the nature of any particular transaction, two general rules seem to be established by the authorities: first, that if the agreement is in substance a mortgage, its form cannot deprive the debtor of his equity of redemption; and secondly, that courts will lean very strongly towards construing the agreement to be a mortgage rather than a conditional sale.²

It need hardly be added that where it plainly appears that a

¹ See note to the case of *Haines v. Thomson*, 11 Am. Law Reg. N. S. 680.

² *Cornell v. Hall*, 22 Mich. 377; *Watkins v. Gregory*, 6 Blackf. 113; *Peterson v. Clark*, 15 Johns. 205; *Rice v. Rice*, 4 Pick. 349; *Hughes v. Sheaff*, 19 Iowa, 342; *Wilson v. Patrick*, 34 *Id.* 370; *Weathersly v. Weathersly*, 40 Miss. 469; *Wing v. Cooper*, 37 Verm. 179. See, also,

Kerr v. Gilmore, 6 Watts, 405; *Heister v. Madeira*, 3 Watts & Serg. 384; *Ruffler v. Wornack*, 30 Tex. 332; *Robinson v. Willoughsby*, 65 N. C. 520; *Carpenter v. Snelling*, 97 Mass. 452; *Notes to Thornborough v. Baker*, 2 Lead. Cas. Eq. 628, (3d Am. ed.); 2 Wash. on Real Prop. 62, 64.

conditional sale was intended, the parties will be held to their bargain.¹

155. In favor of the equity of redemption a court of chancery will allow a deed, absolute on its face, to be shown to be a mortgage. This principle is recognized in nearly all, if not all, the States of the Union, and is settled by a host of decisions.² Parol evidence is admissible in such cases in most of the States of the Union, but it must be very clear.³

The ground upon which this doctrine is placed by Chancellor Kent is that of fraud, accident, or mistake; and according to that view, where neither of these elements exists, the absolute deed cannot be shown to be a mortgage.⁴ But it has been decided in the Supreme Court of the United States, that where a deed is *intended* to operate as a mortgage, it would be a fraudulent act on the part of the grantee to insist upon its being absolute, and on that ground the grantor would be entitled to relief.⁵

156. Equity, having thus interposed so justly and so decidedly in favor of the mortgagor, was now ready to lend its assistance to the mortgagee, who, in his turn, might have been subjected to great inconveniences if the court of chancery had not come to his relief. Because, for a man to hold possession of an estate, and yet to be all the time at the risk of being deprived of the enjoyment of it at the option of the debtor, and whenever it might suit the convenience of the latter to pay the debt, was, it is plain, a very precarious and uncertain tenure by which to hold land. The mortgagee could not improve beyond the necessary repairs, without being liable to have the improved property taken away from him at any moment.⁶

¹ Conway's Exrs. v. Alexander, 7 Cranch, 218; Haines v. Thomson, 20 P. F. Smith, 434; Pearson v. Seay, 35 Alab. 612. 200. In Massachusetts such evidence is not admissible; Lincoln v. Parsons, 1 Allen, 388.

² Among the more recent authorities upon this point are Villa v. Rodriguez, 12 Wallace, 323; Sweet v. Parker, 7 C. E. Green, 453; Horn v. Keteltas, 46 New York, 605; Oldenbaugh v. Bradford, 17 P. F. Smith, 96; French v. Burns, 35 Connec. 359; Wing v. Cooper, 37 Verm. 179; Shays v. Norton, 48 Ill. 100.

³ See 2 Washburn on Real Property, 50 et seq.; Lindauer v. Cummings, 57 Ill.

⁴ See Stevens v. Cooper, 1 Johns. Ch. 425; following the rule in Irnham v. Child, 1 Bro. Ch. C. 92.

⁵ Babcock v. Wyman, 19 How. 289; Morgan v. Shinn, 15 Wal. 105. See 2 Wash. Real Prop. 58, and the American note to Woollam v. Hearne, 2 Lead. Cas. Eq. 678 et seq., where the subject is discussed at length.

⁶ See post, p. 162.

It was, therefore, decided in equity, that a bill would be entertained for the purpose of foreclosing (as it was termed) the mortgagor's equity of redemption. By the decree made under this bill, a new day was fixed, on or before which the debtor was required to pay the debt, and if he failed to meet his obligation at the new date thus specified, his right to redeem was forever foreclosed, and his estate absolutely forfeited to the mortgagee.

It required one step more to render the remedy entirely fair to both parties. This was effected in England by the statute 15 & 16 Vic., c. 86, under which a sale of the mortgaged premises can be made in a foreclosure suit. So much of the proceeds as is necessary to pay to the mortgagee his debt, interest, and costs is devoted to that purpose, and the balance is handed to the mortgagor. The mortgagee's remedy in many of the United States is prescribed and regulated by statute, and in some of them a foreclosure is accomplished by petition or *scire facias*. In others, the proceedings by bill in equity are retained, being in some cases, however, slightly modified by statute;¹ and in nearly all of them the proceedings in foreclosure result in a sale of the mortgaged premises.

157. During the existence of the mortgage there are certain other rights of the parties which have not yet been noticed, but which ought to be spoken of.

And, in the first place, as to the mortgagor, it must be remembered that if he is suffered to remain in possession, he remains in as owner, and is not accountable for the rents and profits. As long as he is permitted by the mortgagee to retain the actual enjoyment of the estate, his rights of ownership are the same as those of any other holder of a fee; subject, however, to this qualification—he cannot commit waste.²

If a mortgagor is wasting the land so as to affect the security of the mortgagee, chancery will interfere on a bill filed by the

¹ It would be impossible to notice the statutory provisions in the different States as to the remedies of the mortgagee. Reference may be had to the synopsis of the statutes in the Introduction, *ante*, p. 18; and to Washburn on Real Prop., Book I., Ch. XVI., Sec. X.
² 2 Spence Eq. 648; 1 Wash. on Real Prop., Book I., Ch. XVI., Sec. V.

latter for the purpose of restraining this inequitable use of his estate on the part of the mortgagor.

On the other hand, a court of equity will not only restrain the mortgagee when in possession from committing waste, but will also hold him accountable for the rents and profits. His possession not being a tortious one, he is, of course, not considered liable for all that he *might* have received—he is only answerable for all that he has *actually* received, or could have collected with reasonable diligence. He is not to be held to the strictest accountability on the one hand, and, on the other, he is not permitted to be entirely negligent or wasteful in the management of the estate. And he is responsible, to the same extent, when he has assigned the mortgage; because it is considered his duty to see that none but a proper person is allowed to enter into possession of the land.¹

158. One of the consequences of the fact that a mortgage is in form a conveyance of the legal title from the mortgagor to the mortgagee, was that a second mortgagee could acquire only an equitable title to the mortgaged property; in other words, he was merely an equitable encumbrancer. Now, in case an equitable encumbrancer gets in the legal title, then, unless there is some countervailing equity to deprive him of this advantage, his position will be superior to that of his fellow encumbrancers, in obedience to the equitable maxim that where equities are equal the law shall prevail. This is the origin of the doctrine of *tacking*—which exists in the law of mortgages in England, but which has rarely been adopted in the United States. The doctrine may be best explained by an example. Suppose there are three mortgages, all of different date. The mortgagee first in point of time will hold the legal title, the other two will be simply equitable encumbrancers. Now, if the third mortgagee buys in the first mortgage, so as to become the owner of the legal title,

¹ Upon the subject of the extent of the accountability of a mortgagee in possession, and the manner of taking the account, see *Sanders v. Wilson*, 84 Verm. 821; *Miller v. Lincoln*, 6 Gray, 556; *Bell v. The Mayor of New York*, 10 Paige, 73; *Strong v. Blanchard*, 4 Allen, 538; *Boston Iron Co. v. King*, 2 Cush. 400; *Shaeffer v. Chambers*, 2 Hals. Ch. 548; *Rawlings v. Stewart*, 1 Bland, 22, note; *Breckenridge v. Brooks*, 2 A. K. Marsh. 339; *Powell v. Williams*, 14 Alab. 476; *Harper's Appeal*, 14 P. F. Sm. 315; 2 Wash. on Real Prop. 204 to 216.

he has a right to tack the two mortgages together, and realize the whole amount due on both, prior to the second mortgagee, whose security is thus, as it were, squeezed out between the first and third mortgage.¹ But this can only be allowed in those cases in which the third mortgagee had no notice of the existence of the second mortgage, at the time he took his mortgage. If he became mortgagee with notice, *at the time*, of the second mortgage, he will not, under these circumstances, be allowed to protect himself by getting in the first mortgage to the prejudice of the second mortgagee.² But notice of the existence of the second mortgage, *after* he has advanced the money, cannot then deprive him of the right to buy in the legal title, and protect himself thereby.³ A junior encumbrancer, if he finds that he is likely to be postponed to a prior lien, of which he had no notice when he became mortgagee, may protect himself by getting in the legal title, and using it (as has been said), as a plank in a shipwreck.⁴

So, also, if a mortgagee lends a further sum on another mortgage, he will be allowed to tack the last mortgage to the first, and cut out a second encumbrancer.

The right to tack does not exist in favor of judgment creditors, or of any one except those who advanced their money on the credit of the land. A first mortgagee may, however, tack a judgment to his mortgage.⁵

159. The doctrine of tacking (which is an extremely harsh and inequitable one) does not exist to any extent in the United States.⁶ A rule apparently analogous may, however, be found in those cases where a mortgage is given to secure future advances, and where the mortgagee is allowed to recover sums subsequently advanced, as against a *mesne* mortgagee.

The general definition of a mortgage given above, supposes that the debt intended to be secured was contemporaneous with, or prior to the mortgage. Mortgages, however, are sometimes

¹ See notes to *Marsh v. Lee*, 1 Lead. Cas. Eq. 615 (4th Eng. ed.), where this subject is discussed at length.

² *Id.* 621.

³ 1 Lead. Cas. Eq. 616.

⁴ By Lord Hale in *Marsh v. Lee* (*supra*).

⁵ Notes to *Marsh v. Lee* (*supra*).

⁶ See 4 Kent's Com. 178, 179; 2 Sug. V. and P. 500 (8th Am. ed.), notes.

given for the purpose of securing advances to be made in the future; and when this is the case questions of no little interest and importance arise. A leading authority upon the general subject, in England, is the case of *Brace v. The Duchess of Marlborough*.¹ It was there held (*inter alia*) that "if a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a *mesne* mortgagee till both the mortgage and statute or judgment are paid;" and it has been decided that *a fortiori* is this the case, if the first mortgagee lends the additional sum on a mortgage.² But this rule is subject to the qualification, also laid down in *Brace v. The Duchess of Marlborough*, that the party making the subsequent advance must have had *no notice* of the second mortgage; for being without notice is his sole equity.³ It has, moreover, been held that even if the first mortgage is given to secure a sum and *further advances*, yet if the first mortgagee made such further advance after notice of a *mesne* incumbrance, he will not be entitled to priority in respect of the same.⁴ And this is the rule even although the second mortgagee had notice of the nature of the first mortgage.⁵

In the United States it has been established law for many years that a mortgage may be given for future advances—for debts to be contracted, as well as for those already due.⁶

The future advances, however, to be protected, must be made without notice of the intervening encumbrance.⁷ And it has

¹ 2 P. Wms. 491.

² *Morret v. Parke*, 2 Atk. 52.

³ 1 Lead Cas. Eq. 621, note to *Marsh v. Lee*.

⁴ *Shaw v. Neale*, 20 Beav. 157; 6 H. L. Cas. 581; *Hopkinson v. Rolt*, 9 H. L. Cas. 514. These cases overruled the old case of *Gordon v. Graham*, 2 Eq. Cas. Ab. 598; which was, however, erroneously reported, the decision being, in fact, the other way. In Maryland, the case of *Gordon v. Graham*, as reported, has been followed; *Wilson v. Russell*, 14 Maryl. 495.

⁵ *Shaw v. Neale*; *Hopkinson v. Rolt*.

⁶ *United States v. Hooe*, 3 Cranch, 89; *Shirras v. Caig*, 7 Cranch, 34; *Johnson v. Richardson*, 38 N. Hamp. 353; *Seymour v. Darrow*, 31 Verm. 122; *Crane*

v. Deming, 7 Conn. 387; *Joslyn v. Wyman*, 5 Allen, 62; *Goddard v. Lawyer*, 9 *Id.* 78; *Bank of Utica v. Finch*, 3 Barb. Ch. 293; *Bell v. Fleming*, 1 Beas. 13, 490; *Ladue v. The Railroad Co.*, 13 Mich. 380; *Tully v. Harloe*, 35 Cal. 302; *Foster v. Reynolds*, 38 Mis. 553; *Moroney's Appeal*, 12 Harris (Pa.), 372; *Farnum v. Burnett*, 6 C. E. Green, 87; Note to *Marsh v. Lee*, 1 Lead. Cas. Eq. 606. Though in New Hampshire, by statute, the rule is the other way. *New Hampshire Bank v. Willard*, 10 N. H. 210; *Johnson v. Richardson*, 38 *Id.* 355.

⁷ *Brinkerhoff v. Marvin*, 5 J. C. R. 320; *Shirras v. Caig*, 7 Cranch, 45; 1 Lead. Cas. Eq. 608.

been held that the recording of the intervening encumbrance is sufficient notice.¹ But where advances are made in pursuance of a binding agreement, the party making them will be protected.²

It must be remembered that when the subsequent advances are not made by the first mortgagee, in pursuance of the terms of the first mortgage, but by virtue of an independent and subsequent security, the only thing which will protect him in such a case will be the doctrine of tacking, which (as has been already stated) is not generally recognized throughout the United States.

The equity of redemption being considered in equity as an *estate*, the interest of the mortgagee is in the eye of equity personalty, and passes to the executor, and not to the heir. A transfer of the debt, secured by a mortgage, will entitle the assignee to the benefits of the mortgage security; and the payment of the debt will operate to revest an absolute title in the mortgagor, without the necessity of any reconveyance.³

160. In dealing with the two titles of the mortgagor and mortgagee, equity will sometimes interfere for the purpose of preventing the application of the doctrine of merger, by which the interests of the owner of the land might be injuriously affected. It is well settled that where the legal and equitable estate in the same land become vested in the same person, the equitable will merge in the legal estate;⁴ and so, upon the same principle, in the case of mortgages, if the owner of the land becomes also the owner of the mortgage, the two titles will not, as a general rule, remain alive and distinct, but the title as mortgagee will sink into and be swallowed up in the more perfect and complete title as owner.⁵ Now, it sometimes happens that to allow this general rule to operate would be productive of great hardship, and would be exceedingly inequitable; for it might be highly for the interest of the owner that the mortgage should be kept alive. Thus, cases have arisen in which the equity of redemption is liable to the dower of the wife of a former

¹ *Spader v. Lawler*, 17 Ohio, 371; though see *Shirras v. Caig*, 7 Cranch, 45.

² *Crane v. Deming*, 7 Conn. 387; *Moroney's Appeal*, 12 Harris, 372; *Farnum v. Burnett*, 6 C. E. Green, 87; 1 Lead. Cas. Eq. 608. See *Washburn on Real Prop.* 146.

³ 4 Kent's Com. 194, and notes; *Williams on Real Prop.* 391.

⁴ *Perry on Trusts*, § 347. See 2 *Spence Eq.* 879, 880.

⁵ *Washburn on Real Prop.*, Book I., Chap. XVI., Sec. VI.

owner, which had been released to a former mortgagee. If, now, the purchaser of the equity of redemption subject to dower buys in the outstanding mortgage, it would be manifestly to his advantage that the mortgage should be kept alive, as otherwise the right of dower would be let in.¹ In such a case as this equity will treat the mortgage title as still subsisting, and will prevent the application of the doctrine of merger. Such an interposition of equity for the purpose of keeping the two titles distinct, will take place, unless there is a declared intention in favor of the merger, or unless such an intention can be presumed to exist from the circumstance that such a merger would be to the owner's advantage.²

161. In addition to the regular and ordinary mortgages above spoken of, there are other securities which are held in equity to be valid encumbrances, and which, partaking somewhat of the nature of mortgages, are frequently termed equitable mortgages.

Such are the vendor's lien for purchase-money; mortgages created by the deposit of title deeds; mortgages of equitable interests; and charges of certain kinds. These, however, are in the nature of *liens*, and do not result in the creation of an independent, equitable *title*. They will, therefore, be considered in the second general division of this treatise under a separate head.³

¹ 2 Wash. on Real Prop. 181. See, also, *Evans v. Kimball*, 1 Allen, 240; *Cook v. Brightly*, 10 Wright (Pa.), 439.

² *Knowles v. Lawton*, 18 Georgia, 476; *Waugh v. Riley*, 8 Met. 290; *Van Nest v. Latson*, 19 Barb. 604; *Hutchins v. Carleton*, 19 N. Hamp. 487; *Den v. Brown*, 2 Dutch. 196; *Loomer v. Wheelwright*, 3 Sand. Ch. 157; *Washburn on Real Prop. ut sup.*

³ See *post*, Part II., chapter on Liens. Mortgages of personal property will also be considered in the same connection. The general principles applicable to mort-

gages of personalty, so far as they relate to the creation of an equitable title, viz., the equity of redemption, and the existence of an equitable remedy, viz., a foreclosure bill, are the same as those which govern mortgages of real estate. But it has been thought that the brief notice which it is necessary to give to the subject of mortgages of personalty, may be more appropriately introduced in immediate connection with pledges of personalty, which will be considered in the chapter on Liens.

CHAPTER VIII.

ASSIGNMENTS.

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| 162. Common law rule forbidding assignment of <i>choses in action</i> .
163. Exceptions.
164. Such assignments allowed in equity.
165. Assignments of future property; <i>Holroyd v. Marshall</i> .
166. Exceptions to the general rule.
167. Requisites to an equitable assignment.
168. When notice of assignment necessary; to whom given. | 169. Authorities in the United States conflicting.
170. Effect of equitable assignments; assignment is subject to equities between original parties.
171. Whether assignment is subject to equities of third parties.
172. Rights of action of the assignee at law; in equity.
173. Liability to be sued cannot be transferred; exceptions. |
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162. THE subjects of property may be divided into two classes—things in possession, and things not in possession; and things not in possession may again be divided into those things of which there is a present right to the immediate possession, and those things of which there is a mere right to the future possession. Thus a man may either own a cargo of oil (for example) which he has in his possession, or which he has an immediate right to recover from the possession of another who unlawfully detains it, or which he has the present right to demand and receive at some future time, or which does not yet exist.

The consequences or incidents of these rights may vary, but in all of these cases there is a general, present, right or title of ownership, which any perfect system of justice ought to recognize, protect, and enforce.

Now, the common law could only deal completely with the first of these rights or titles—that is to say, the only ownership which the common law completely recognized, was the ownership accompanied by possession. In such cases the owner could enjoy the property, or transfer it to another. But where the ownership and the possession were severed, the only right which the common law recognized was the right to recover the

- possession; in other words, the right of the real owner was simply a law suit—a *chose in action*. And this right or *chose in action* he could not assign. Where there was a present right to the future acquisition of property, the common law was still more at fault, for there was not even a right to recover the goods, but only a right to recover damages for their non-delivery.¹

Now, at common law, these rights to things not in possession by whatever name they were called, whether *choses in action*, possibilities, expectancies, things not *in esse*, and mere contingencies, were, as a general rule, incapable of being assigned; the reason being twofold: first, that to allow such transfers would be to violate the rules against maintenance and champerty;² and, secondly, because there could be no valid sale unless the thing to be sold was *in rerum naturâ*, and under the immediate control of the vendor. Hence it was considered against sound policy to allow any man to transfer to another a mere right to recover in a suit at law, because, in this way (under the old conditions of society), litigation would necessarily be encouraged, and the rich would be induced to buy up law suits for the purpose of enforcing them against the poor;³ and hence, also, it was considered absurd to make a sale when the thing to be sold was not in the actual ownership of the seller. The common law, therefore, sought to prevent this result so far as maintenance was concerned, by a twofold method: in the first place, by punishing such transfers of rights of action as crimes, known in criminal jurisprudence as maintenance and champerty; and, in the second place, by refusing to recognize the title of the transferee of the debt or other *chose in action*, when he sought to recover upon it in a common law suit. And it pre-

¹ These rights to property deliverable *in futuro* must be distinguished from remainders and reversions, in which the possession of the particular tenant endured to the benefit of the remainderman or reversioner.

² Co. Litt. 214, a; Lampet's Case, 10 Coke, 47; Cassedy v. Jackson, 45 Miss. 402; Pelletreau v. Jackson, 11 Wend. 111; Jackson v. Waldron, 13 Id. 178;

Needles v. Needles, 6 Ohio (N. S.), 442; note to Ryall v. Rowles, 2 Lead. Cas. Eq. 770 (4th Eng. ed.).

³ It will be remembered that, in early English history, the protection of the poor against the oppression of the rich was one of the great occasions which called for judicial interference, especially on the part of the chancellor. See *ante*, page 10.

vented the sale of things of which the vendor had not the immediate right to possession, by falling back upon the rude common sense notion that if you had not a thing to sell you could not sell it; in other words, that to every bargain there must be an actual, subsisting subject.

163. To this general rule there were, at common law, two exceptions, one resulting from the dignity of the person concerned, and the other rendered necessary by the character of the subject matter of the transfer.

The king could be the assignee of a *chose in action*;¹ and an annuity (although in reality nothing more than a *chose in action*) could be assigned. The reason of the first of these two exceptions was, perhaps, the exalted rank of the individual, which forbade the application of the ordinary rules; for a transfer to the fountain and head of all justice, could not (it was presumed) be supposed to work injustice. To except annuities from the operation of the rule was in fact illogical, as by strict reasoning they should undoubtedly have fallen within it; but it was, perhaps, felt that it would be oppressive if this very common species of property, were not to enjoy the same qualities of alienability which were possessed by other kinds of personalty, and hence the exception sprang up out of a kind of necessity, and is now thoroughly established.²

164. Such was the rule, and such the exceptions, at common law. In equity, while the rule which prohibits the transfer of mere litigious rights has been recognized and upheld, yet the exceptions to the common law doctrine have been so numerous that the principle may now be stated to be firmly established, that, in equity, assignments of *choses in action*, possibilities, expectancies, things not *in esse*, and mere contingencies will be protected and enforced. In other words, equity completely recognizes and enforces the present ownership of things not in possession.³

Thus a debt, a mere chance of acquiring an estate,⁴ an expecta-

¹ Co. Litt. 232, b. n. Note to *Ryall v. Row v. Dawson*, 1 Ves. 331; 2 Lead. Cas. Rowles (*sup.*). Eq. 731.

² *Gerrard v. Boden*, Hetl. 80.

⁴ *Hobson v. Trevor*, 2 P. Wms. 191;

³ See *Wright v. Wright*, 1 Ves. 412; *Wethered v. Wethered*, 2 Sim. 183. *Garland v. Harrington*, 51 N. Hamp. 414;

tion of an inheritance,¹ or personal property not yet acquired by the assignor, or not yet *in rerum naturâ*, may all be assigned in equity, and the assignee can have relief in a court of chancery, if that relief is necessary to protect or enforce his title.

165. The principles upon which assignments in equity are based, especially those which have for their subject property to be acquired *in futuro*, have been discussed with great care and learning, during the last few years, in the highest English courts.

It had been decided by the courts of law, that an assignment of future acquisitions, as, for example, the future freight, earnings, and profits of a ship, was void at law;² while in equity the same assignment had been upheld.³ But the opinion existed and continued to prevail for some time, that the equitable right would be imperfect and incomplete unless there was a subsequent possession or some act equivalent to it, for the purpose of perfecting the title; or, in other words, that the maxim of Bacon in regard to legal assignments, "*Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens quæ fortiatur effectum interveniente novo actu,*" was applicable also to equitable assignments, and that the latter, equally with the former, would be incapable of enforcement, unless there was "*novus actus interveniens.*"⁴ Upon this ground Lord Chancellor Campbell decided the case of *Holroyd v. Marshall*, and held that where there had been an agreement, by which the machinery and implements thereafter to be brought into a mill should be subject to the trusts of a mortgage, and such machinery was afterwards brought in and had been taken in execution by creditors of the assignor before the equitable assignees had done anything to perfect their title, the assignment was invalid as

¹ *Id.*

² *Robinson v. McDonnell*, 5 Maule & Sel. 227; trover for the ship *Warre* and 500 tons of oil. This was the general rule at law; see *Lunn v. Thornton*, 1 C. B. 379; *Hamilton v. Rogers*, 8 Maryl.

301. The modern tendency of courts of law is towards adopting the doctrines of courts of equity upon these subjects. *Brown v. Bateman*, L. R. 2 C P. 272. See, however, *Blakely v. Patrick*, 67 N. Carolina, 40.

³ *In re ship Warre* (in the matter of *Robinson et al.*, Bankrupts), 8 Price, 269, n. See, also, *Field v. The Mayor of New York*, 2 Seld. 179; *Emery v. Lawrence*, 8 Cush. 151; *Boylan v. Leonard*, 2 Allen, 407.

⁴ See American note to *Row v. Dawson*, 3 Lead. Cas. Eq. 347, where the authorities based upon this doctrine, which, in equity at least, is no longer sound, are collected.

against the execution creditors. But on appeal to the House of Lords, this decree was reversed. In his judgment in that case, Lord Westbury gave a most lucid statement of the law upon the subject. The true ground upon which this and similar decisions are to be placed appears to be, that a court of equity enforces such assignments on the ground that the assignee is entitled to have immediate specific performance of the contract to assign, as soon as the property comes into existence in the hands of the assignor. Neither in equity, nor in law, can a contract to transfer property not then in existence, operate as an immediate alienation, for the simple reason that there is nothing to transfer. But immediately upon the acquisition of the thing, the assignor holds it in trust for the assignee, whose title requires no act on his part to perfect it, and cannot be disturbed by an execution creditor of the assignor.¹ The assignee, however, has an equitable *title* from the time of the assignment; as is illustrated by the case of *Ex parte Barber*,² where an undertaking to hand over the bill of lading of a cargo of oil, then *en route* to the assignor, was held to give the assignee a right superior to that of the assignees in bankruptcy under a *fiat* issued eight days after the assignment.³ The present transfer of future property, moreover, differs from the mere power to seize it.⁴

The doctrine under consideration is of very great practical importance. If the right of the assignee rises (as it is here conceived it does) to the dignity of a title to the specific property,

¹ *Holroyd v. Marshall*, 10 H. L. Cas. 209. This case was twice argued in the House of Lords. Upon the first argument, the law Lords present were Lords Campbell, Wensleydale, and Chelmsford. Lord Campbell adhered to the opinion which he had pronounced as chancellor (2 De G. F. & J. 596), and Lord Wensleydale was disposed to agree with him; but Lord Chelmsford was in favor of reversing the decree. Upon the second argument, after the death of Lord Chancellor Campbell, Lord Westbury, then chancellor, delivered the opinion, referred to in the text, which induced Lord Wensleydale to change his mind, and confirmed Lord Chelmsford in his views. See further on

this subject *Wright v. Wright*, 1 Ves. 411; *Langton v. Horton*, 1 Hare, 549; *Lindsay v. Gibbs*, 22 Beav. 522; *Brown v. Tanner*, L. R. 3 Ch. App. 397; *Wilson v. Wilson*, L. R. 14 Eq. 32; *Brown v. Bateman*, L. R. 3 C. P. 272; *Philadelphia, etc., R. R. v. Woelpper*, 14 P. F. Sm. 372; *Morrill v. Noyes*, 56 Maine, 465; *Mitchell v. Winslow*, 2 Story, 230. *Post*, Part II., chap. on Liens.

² 3 Mont. Deac. & DeG. 174.

³ See also *Gardner v. Lachlan*, 4 My. & Cr. 129; *Curtis v. Auber*, 1 Jac. & Wal. 526.

⁴ See *Reeve v. Whitmore*, 33 L. J. Ch. 63-66; 4 De G. J. & Sm. 1.

it cannot be defeated by an assignee in bankruptcy (for example) who could not, therefore, successfully resist an action, or rather a bill in equity, to recover the specific goods. If the right of the assignee is a mere right to recover damages for the non-fulfilment of a contract to deliver goods, he would necessarily come in, *pari passu*, with other creditors of the insolvent vendor.

It seems, however, that in order to create an equitable *title* or *estate* in the assignee, the property must be, in some way, specifically pointed out.¹

A covenant affecting lands thereafter to be acquired, if it specifies the land, and the property is afterwards acquired with an intent to satisfy the covenant, will operate in equity upon the lands so afterwards acquired.²

166. To the general equitable rule which favors transfers of things not in possession, there are, however, certain exceptions, just as we have seen that there are exceptions to the common law rule forbidding such assignments.

Thus, in equity a mere litigious right, the transfer of which would simply tend to encourage litigation, and thus fall within the spirit of the rule against maintenance, will not be recognized. Therefore a bare right to file a bill in chancery on the ground of fraud, cannot be assigned even in equity.³

So, too, equity will not recognize assignments of certain species of property, which it would be against the policy of the law to allow the owners to part with. These are pensions given as rewards for extraordinary services, pay or half pay in the army, the salaries of judges, and other revenues and emoluments of a kindred character, which reasons of state require should remain always for the benefit of the person to whom they were originally given.⁴

¹ Belding v. Read, 3 Hurl. & Colt. 961; Morrill v. Noyes, 56 Maine, 465. See Benjamin on Sales, pp. 62-67.

² Metcalfe v. The Archbishop of York, 1 M. & Cr. 547; Lyde v. Mynn, 4 Sim. 505; Wellesley v. Wellesley, 4 My. & C. 579; 2 Lead. Cas. Eq. 772. See, however, Countess of Mornington v. Keene, 2 De G. & Jo. 292.

³ De Hoghton v. Money, L. R. 2 Ch.

App. 169; Prosser v. Edmunds, 1 Y. & C. Exch. R. 481; Milwaukee and Minnesota R. R. v. The Milwaukee and Western R. R., 20 Wis. 188; Gardner v. Adams, 12 Wend. 297; Marshall v. Means, 12 Georgia, 61. See, also, Wilbite v. Roberts, 4 Dana, 172; Slade v. Rhodes, 1 Dev. & Bat. Eq. 24.

⁴ Stone v. Lidderdale, 9 Anst. 533; Emerson v. Hall, 13 Pet. 409; Arbuthnot v. Norton, 5 Moore, P. C. C. 219; though

A purely personal trade-mark is not assignable.¹

It has been held, moreover, that the right of action for a mere personal tort cannot be assigned;² but a right to recover damages for an injury to *property* may undoubtedly be assigned.³

It was said in *Mandeville v. Welch*,⁴ that an order drawn on a fund for only a part thereof, does not amount to an assignment of that part, for the reason that a creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor. In other words, the rule was laid down that a *part* only of a *chose in action* cannot be assigned, but that if there is any transfer there must be a transfer of the whole. But this was in a common law action; and although the rule has been approved in several cases, it may well be doubted whether it is sound as a doctrine of equity.⁵

It has been decided in many cases in this country that land held adversely cannot be assigned; and it has been further held, that as such assignments are considered void on the ground of public policy, they ought not to be enforced in equity.⁶ In other States, however, the rule which forbids such assignments does not prevail.⁷

167. The general rule in regard to the assignment of *choses in action* in equity having been stated, the next subject for consideration is the manner in which these assignments are to be effected, and the steps, if any, which the assignee has to take in order to perfect his title to the thing sought to be transferred.

No particular form of words is necessary in order to make a valid assignment of a *chose in action*.⁸ Nor is any written instrument required, for it is sufficient if there is a verbal declaration

see *State Bank v. Hastings*, 15 Wis. 75; and *Meriwether's Admr. v. Herran*, 8 B. Mon. 162.

¹ Kerr on Injunctions, 479.

² *The People v. Tioga*, 19 Wend. 73.

³ *North v. Turner*, 9 Serg. & R. 244; *Butler v. The Railroad*, 22 Barb. 110.

⁴ 5 Wheat. 288.

⁵ See *Caldwell v. Hartupée*, 20 P. F. Sm. 74, 79; *Field v. The Mayor of New York*, 2 Seld. 179. It must be admitted, however, that the weight of authority is

on the side of *Mandeville v. Welch*. See 3 Lead. Cas. Eq. 356. See, also, *Chicago R. R. Co. v. Nichols*, 57 Ill. 467.

⁶ *Hoppiss v. Eskridge*, 2 Ired. Eq. 54.

⁷ See note to *Ryall v. Rowles*, 339; *Edwards v. Parkhurst*, 21 Verm. 472.

⁸ *Row v. Dawson (supra)*; *Thompson v. Speirs*, 13 Sim. 469; *Gurnell v. Gardner*, 4 Giff. 626; *Buck v. Swazey*, 35 Maine, 41; *Conway v. Cutting*, 51 N. Hamp. 407.

whereby the intention to part with the ownership of the *chose* is properly manifested.¹ Thus, if A. is a creditor of B., and wishes to transfer the debt to C., an order, verbal or written, from A., directing B. to pay the amount due to C., will be a good equitable assignment.²

So, also, where the owner of goods, then in the hands of his agent, promised a creditor by letter that he would direct the agent to deliver the goods to the creditor, and did subsequently give such a direction, it was held that this operated as an equitable assignment.³

And an order payable out of a particular fund, may operate as an assignment of the fund.⁴

But a mere direction to an agent to collect money, and hand it over to a third party, will not amount to an assignment. Thus a railway contractor, being indebted to his bankers, wrote to the solicitors of the company authorizing them to receive the money due to him from the company, and pay it over to his bankers—and the solicitors then wrote to the bankers promising to pay them the money when raised; but it was held that this did not operate as an equitable assignment.⁵ The difference between an order which will, and one which will not, operate as an assignment, appears to be this: If the order is such as to create a mere agency in the party to whom it is given to transfer the *chose* on behalf of the principal, then, like every other power of attorney, it will be revocable at pleasure, and can confer no title upon the third party until the transfer is actually made. But where the order purports to pass a present interest in the *chose* to the alleged transferee, then, no matter what form the transaction may assume, it will be treated in equity as a valid assignment.⁶

¹ Gurnell v. Gardner, 9 Jur. N. S. 1220; v. Stagg, 2 Edwards, 108; Luff v. Pope, Ford v. Stuart, 19 Johns. 342; Thompson v. Emery, 7 Foster, 269. ⁵ Hill, 413. ⁶ Rodick v. Gandell, 1 De G. M. & G. 763.

² Yeates v. Groves, 1 Ves. Jun. 281; Caldwell v. Hartuppee, 20 P. F. Sm. 74.

³ Burn v. Carvalho, 4 My. & Cr. 690; See, also, Langton v. Waring, 18 Com. B. (N. S.) 314.

⁴ Clark v. Mauran, 3 Paige, 373; McLellan v. Walker, 26 Maine, 114; Cutts v. Perkins, 12 Mass. 206. See Phillips

⁵ See Hunt v. Rousmanier, 8 Wheat, 174; 1 Am. Lead. Cas. 676; Beers v. Spooner, 9 Leigh, 153; Tiernan v. Jackson, 5 Peters, 580; Watson v. Bagaley, 2 Jones (Pa.), 164; Beans v. Bullitt, 7 P. F. Sm. 221; notes to Ryall v. Rowles, 2 Lead. Cas. Eq. 777.

Moreover, the mere delivery of the written evidence of the debt, may operate as a valid assignment.¹

168. In order to complete the assignment as against the assignor, the assignee need not give notice thereof to the person who owes the debt, or has the custody of the fund, which is intended to be assigned.²

And this is also so as against the creditors of the assignor,³ or mere volunteers.⁴

But as against subsequent assignees for value, the assignee first in point of time must give notice to the debtor, otherwise he will be liable to be postponed to a second or third assignee, who has given notice. Between different assignees, the one who first gives notice to the debtor will, as a general rule, have the prior right. This is only in obedience to the general principle, which requires that all transfers of property must be rendered as complete as the nature of the transaction will permit, in order to make them valid as against subsequent *bona fide* purchasers, for valuable consideration, without notice.

Thus in the case of personal chattels, possession must be taken. And so in the case of *choses in action*, that which is equivalent to possession, viz., notice to the debtor, must exist in order to give the assignee a perfect title. In other words, the assignee must do everything to assert the ownership which the nature of the subject matter of the contract will allow.⁵

But the assignee is not required to do *more* than is reasonably necessary.⁶

¹ Mowry v. Todd, 12 Mass. 281; Runyan v. Mersereau, 11 Johns. 534; Note to Row v. Dawson, 358. *Ante*, p. 79.

² Donaldson v. Donaldson, Kay, 711; Way's Trusts, 2 De G. J. & Sm. 365.

³ Beavan v. Lord Oxford, 6 De G. Mac. & G. 492; Eyre v. McDowell, 9 H. L. Cas. 618, 652; Scott v. Lord Hastings, 4 K. & J. 633; United States v. Vaughan, 3 Bin. 394; Pellman v. Hart, 1 Barr (Pa.), 263. See Pinkerton v. Railroad, 42 N. Hamp. 424, and Com. v. Watmough, 6 Whart. 117, as to the steps necessary to complete the transfer of a *chose in action*, as against the creditors of the assignor. These authorities are in conflict. See, also, Elliott's

Exrs. App., 14 Wright (Pa.), 75; *post*, Fraud on Creditors.

⁴ Justice v. Wynne, 12 Ir. Ch. R. 289.

⁵ See, *ante*, p. 77. See, also, Milroy v. Lord, 4 De G. F. & J. 264; Warriner v. Rogers, 28 Law Times Rep. (N. S.) 863; Ryall v. Rowles, 1 Ves. 348; Dearle v. Hall, Loveridge v. Cooper, 3 Russ. 1; Spain v. Hamilton's Admr., 1 Wal. 624; Martin v. Sedgwick, 9 Beav. 333; Buller v. Plunkett, 1 John & H. 441; *In re Barr's Trusts*, 4 K. & J. 219; *Ex parte Caldwell*, L. R. 13 Eq. 188; 3 Lead. Cas. Eq. 373.

⁶ Feltham v. Clark, 1 De G. & Sm. 307.

The assignee of a debt is not bound to give notice to the assignor if it is not paid. The rule which exists as to promissory notes in such cases, does not apply.¹

The party to whom notice of an assignment should be given is he who has the legal title, or who owes the money. Thus, if personalty vested in trustees is assigned, notice should be given to the trustees; if a debt, to the debtor; if stock in a public company, to the company; if a future cargo of a ship, to the master.² If the fund to be assigned is in court, according to the English practice, a stop order should be obtained.³ Notice to one of several trustees or joint debtors is in general notice to all; and notice may be by parol.⁴

169. The rule that in order to protect the title of an equitable assignee as against a subsequent assignee, notice of the assignment should be given, is one that is based upon sound principle, and would seem, for many obvious reasons, to commend itself for adoption. It has accordingly been followed in many decisions in the United States.⁵ But there are quite a number of cases in which a different doctrine has been held, and it is therefore impossible to say that any general rule upon the subject exists in this country.⁶ The decisions, however, in favor of the English rule, appear to be based upon the more correct view of the law.

The assignment of a *chose in action* cannot be enforced by a mere volunteer, unless the transaction has so far progressed as to have assumed the nature of a voluntary trust, the incidents of which have already been discussed.

If there is a mere executory agreement to assign, that agreement, like any other, must be supported by a consideration.⁷

170. The *effect* of these equitable assignments is next to be noticed.

¹ Glyn v. Hood, 1 De G. F. & J. 334.

² See note to Ryall v. Rowles, 804 *et seq.* (4th Eng. ed.).

³ *Id.* 807.

⁴ *Id.*

⁵ Vanbuskirk v. The Hartford Ins. Co., 14 Conn. 145; Campbell v. Day, 16 Verm. 558; Loomis v. Loomis, 26 *Id.* 198; Clodfelter v. Cox, 1 Sneed, 330; Mur-

doch v. Finney, 21 Missouri, 138; Woodbridge v. Perkins, 3 Day, 364.

⁶ See American note to Row v. Dawson, 3 Lead. Cas. Eq. 374.

⁷ Notes to Row v. Dawson. See Kennedy's Exrs. v. Ware, 1 Barr (Pa.), 450, where Chief Justice Gibson seemed to think that all assignments were in their nature executory, and should be supported by a consideration.

And first, it must be remarked that the assignee will take the *chose* subject to all the equities between the original parties. Thus if the debtor has any defence or set-off which at the *time of the assignment* would be good as against the assignor, the same defence can be taken, or the same set-off made use of as against the assignee.¹ And so (for example) the assignment of anything that is coming to a contractor, under a building contract, is necessarily subject to the conditions of that contract, and to the rights of the other party to that contract whatever they may be.² The debtor may, however, by his conduct estop himself from taking advantage of such a defence or set-off, if he actively misleads the assignee as to its existence, or improperly remains silent when fair dealing would command him to speak.³

Another case in which the assignee will not take subject to equities is that of negotiable paper; but this is not so much an exception to the general rule, as a particular custom growing out of the law merchant, in the case of bills of exchange, and extended to promissory notes by the statute of 3 and 4 Anne.

171. It has been decided in some cases, that the assignee of a *chose in action* will take it not only subject to the equities between the original parties to the contract, but also to existing equities in favor of third persons.⁴ Thus, where there are two successive purchasers of the same equitable interest, the second purchaser, according to the authorities just cited, will take subject to the rights of the first. On the other hand, there are not wanting opinions to the effect that the assignee of a *chose in action* is only subject to the equities of the party bound by

¹ *Turton v. Benson*, 1 P. Wms. 497; *In re Natal Investment Co.*, L. R. 3 Ch. App. 355; *Beebe v. The Bank of New York*, 1 Johns. 529; *Kamena v. Huelbig*, 8 C. E. Green, 78; *Jeffries v. Evans*, 6 B. Mon. 119; *The Bank v. Fordyce*, 9 Barr, 275; *Andrews v. McCoy*, 8 Alab. 920; *Ragsdale v. Hagy*, 9 Grat. 409; *Barney v. Green*, 28 Verm. 391; *American note to Row v. Dawson*, 3 Lead. Cas. Eq. 369; 1 *Parsons on Contracts*, 227.

² *Tooth v. Hallett*, L. R. 4 Ch. App. 245.

³ *In re Agra and Masterman's Bank*, L. R. 2 Ch. App. 391; *In re General Estates Company*, L. R. 3 Ch. App. 758; *Jones v. Hardesty*, 10 G. & Johns. 404; *Decker v. Eisenhauer*, 1 Penna. R. 476; *Sargeant v. Sargeant*, 18 Verm. 871; *Bank v. Jerome*, 18 Conn. 448; *Watson's Exrs. v. McLaren*, 19 Wend. 557; and see *post*, Part II., Chap. III., Estoppel.

⁴ *Bush v. Lathrop*, 22 N. York, 535; *Schafer v. Reilly*, 50 *Id.* 67; note to *Row v. Dawson*, 3 Lead. Cas. Eq. 372.

its obligation (the debtor), and not to those of prior assignees.¹ The true solution of the difficulty would appear to be found in correctly applying the maxim that between equal equities priority of time will prevail,² the meaning of which is, that as between persons having only equitable interests, if such equities *are in all other respects equal, qui prior est tempore, potior est jure.*³ If there is nothing else in the case to turn the scale, and the only fact before the court is the bald fact of priority of time, *that*, of course, will be conclusive. But in practice this is scarcely ever the case. It almost universally happens that two other questions have to be taken into consideration—the question of *laches*, and that of notice.⁴ If the first purchaser has been guilty of *laches*, his equity becomes inferior to that of the second purchaser, and the equity of the latter will then prevail; for priority of time is the *last* ground of preference resorted to, and will never be considered if there is anything else to turn the scale.⁵ On the other hand, the second purchaser may, under the circumstances of the particular case, be in a condition to avail himself of the plea of a *bonâ fide* purchaser for value without notice; and it is now well settled that such a plea is available for the protection of an equitable, as well as a legal title.⁶

Therefore, in examining into the relative merits (or equities) of two persons having adverse equitable interests, the points to which attention must be directed are these: the nature and condition of their respective equitable interests; the circumstances and manner of their acquisition; and the whole conduct of each party with respect thereto.⁷ If the inquiry be directed to these grounds, a decision on the narrow point of priority of time will seldom, if ever, be found necessary.

172. Another effect of the assignment is that the assignee

¹ *Livingston v. Dean*, 2 Johns. Ch. 479; *Murray v. Lylburn*, *Id.* 441; *Taylor v. Gitt*, 10 Barr, 428; *Mott v. Clark*, 9 *Id.* 399; *Metzgar v. Metzgar*, 1 Rawle, 227; *Moore v. Holcombe*, 3 Leigh, 597; note to *Row v. Dawson*, 3 Lead. Cas. Eq. 373.

² *Ante*, p. 50.

³ See *Snell's Equity*, 17; and *Rice v. Rice*, 2 Drew. 73, where the subject is clearly discussed by V. C. Kindersley.

⁴ *Rice v. Rice*, *ut sup.*

⁵ *Rice v. Rice*, 2 Drew. 73; *The Queen v. Shropshire Union Co.*, L. R. 8 Q. B. 420. See, also, *Maybin v. Kirby*, 4 Rich. Eq. 105; and *Judson v. Corcoran*, 17 Howard, 612.

⁶ *Colyer v. Finch*, 5 H. L. Cas. 905, 920.

⁷ *Rice v. Rice*, *The Queen v. Shropshire Union Co.*, *ut sup.*

acquires thereby the right to make use of the name of the assignor, in an action at law to recover the *chose*. The suit must be brought in the name of the original assignor to the use of the assignee; and courts of law now entertain such an action, and a recovery may thus be had in a common law suit. The consequence of this right of the assignee to use the name of the assignor is, that a court of equity will not ordinarily entertain a bill, in the first instance, filed by the assignee against the debtor simply for the purpose of recovering the debt. Thus, if A. is a creditor of B., and transfers the debt to C., this circumstance alone will not justify C. in filing a bill in equity against B. to recover the sum due. C.'s remedy, in the first instance, is a common law action brought against B. in A.'s name to C.'s use.¹ If, however, A. interferes in the matter for the purpose of preventing C. from using his name, or any other circumstance exists by which C.'s right to recover at common law would be likely to be defeated, this will give rise to a jurisdiction in equity, and a bill to enforce the assignment and collect the debt will then be entertained. In cases in which it is proper to resort to equity, the assignee can file a bill in his own name.

While, however, in many instances the assignee may sue at law in the name of the assignor, certain cases still exist in which the remedy of the assignee is in equity alone.²

173. In leaving the subject of this chapter it may be proper to remark that the liability to be sued cannot be transferred or assigned; that is to say, a person bound by a contract cannot, before or after breach, relieve himself from the obligation to perform it by assignment to another; nor will the assignee, without some stipulation on his part, be rendered liable.³ The exceptions to this rule are: the assignment of liabilities on covenants which "run with the land;" the assignment of liability for a debt by agreement among all the parties interested; and the assignment of liabilities in consequence of marriage, bankruptcy, or death.⁴

The rule upon this subject is the same in equity as at law.

¹ See *Chicago R. R. v. Nichols*, 57 Ill. 466. *Mosely v. Boush*, 4 Rand. 392; *Hagar v. Buck*, 44 Verm. 290. See 1 Parsons on

² *Hammond v. Messenger*, 9 Sim. 327; *Contracts*, 224, note (d).

Ontario Bank v. Mumford, 2 Barb. Ch. 596; *Adair v. Winchester*, 7 Gill. & Johns. 76, 234. ³ See Dicey on Parties to Actions, pp.

114; *Smiley v. Bell*, Mart. & Yer. 378; ⁴ *Id.*

PART II.

EQUITABLE RIGHTS.

CHAPTER I.

ACCIDENT AND MISTAKE.

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| 174. Definition of Accident. | 186. Mistakes of two kinds—of Law and of Fact. |
| 175. Limitations upon the relief afforded in equity. | 187. Mistakes of Law; <i>Hunt v. Rousmaniere</i> . |
| 176. Cases in which relief will be afforded. | 188. Misrepresentation and surprise. |
| 177. Lost instruments; advantages of remedy in equity. | 189. Compromises of doubtful rights; family arrangements. |
| 178. Penalties. | 190. Mistakes of Fact; different kinds. |
| 179. Liquidated damages. | 191. Must be mutual, material, and not induced by negligence. |
| 180. Agreements for reduction of debt. | 192. Defective execution of powers. |
| 181. Forfeitures. | 193. What defects may be remedied. |
| 182. Defective execution of powers. | 194. For whose benefit. |
| 183. Miscellaneous cases. | 195. Against whom. |
| 184. Equitable remedies in cases of Mistake. | 196. Miscellaneous cases. |
| 185. Definition of Mistake. | |

174. HAVING considered those cases in which courts of equity afford relief by the creation of titles not known at common law, the next class of subjects for investigation embraces those cases in which chancery affects and controls the enjoyment of legal titles by the operation of certain rights known as equities. Among the first of these equities which present themselves for consideration, are those of Accident and Mistake.

Accident is one of those "cases of extremity," which in the early days of chancery jurisdiction gave to the suitor his right to appeal to the conscience of the chancellor. The particular case afterwards furnished the generic name to this head of juris-

diction, and the term "accident" is now commonly used to include all cases of extremity.¹

It has been said that all attempts to define what accident, in its equitable signification, is, have been unsuccessful;² nevertheless it has been described by a modern author to be an unforeseen and injurious occurrence not attributable to mistake, neglect, or misconduct;³ and this definition seems to be both accurate and comprehensive. A person who has been the sufferer from some such unforeseen occurrence, is entitled, as a general rule, to relief in equity, because ordinarily the courts of common law did not, in such cases, afford redress.

175. Common law courts, however, did not refuse relief in every case,⁴ nor do courts of equity grant redress in all. Hence the jurisdiction of a court of chancery in cases of accident, is circumscribed and defined by certain rules.

Thus equity will not interfere where there has always been an adequate remedy at law. When, however, the jurisdiction of equity has once attached by reason of the original refusal of courts of law to entertain such a case, that jurisdiction of chancery, once acquired, cannot be ousted by any subsequent assumption of jurisdiction in such cases on the part of the courts of law. This is only in accordance with the general maxim already explained.⁵

Equity, moreover, will not interpose to remedy an accident which is the result of the gross neglect or fault of the party seeking relief.⁶ It would, for example, decline to afford relief to the obligee in a bond who has himself destroyed the instrument.⁷

Again, a chancellor will not afford relief so as to entirely release a person from doing something which he has expressly covenanted to do, but of which the performance has become unexpectedly, harsh or burdensome. The instance of this rule, usually given, is the destruction of demised premises by fire, in which case, if there is an express covenant to pay the rent, the

¹ 1 Spence, 628.

² 1 Spence, 628.

³ Smith's Manual of Equity, 36.

⁴ Blackstone Com. 431.

⁵ *Ante*, page 47; *British Empire Ship-*

ping Co. v. Somes, 3 K. & J. 437; *Snell's Eq.* 335; *Story Eq. Jurisp.*, § 80.

⁶ *Story Eq. Jurisp.*, § 105.

⁷ *Davis v. Davis*, 6 Ired. Eq. 418. *Ex*

parte, *Greenway*, 6 Ves. 813.

tenant is compelled to pay, although he has quite lost the enjoyment of the premises, and he can have no relief in equity.¹

Care must be taken to distinguish these cases from that of a penalty incurred by reason of the non-performance of a covenant on a stipulated day, for against such a forfeiture (if the injury inflicted by the non-performance of the covenant can be compensated by damages) equity will relieve. The difference is this: in the case of a forfeiture the plaintiff asks to be relieved from the penalty only, not from his covenant; but in the case above put, of the destruction of demised premises by fire, the tenant asks that the court should relieve him entirely from the obligation to pay rent which he has assumed, and *this* a court of equity will decline to do.

Equity will not interfere on the ground of accident against a *bonâ fide* purchaser for value without notice, or, indeed, in any case in which the equity of the party against whom the relief is sought is equal or superior to that of the party who invokes the aid of the court. On the other hand, a chancellor will not interpose upon the application of a mere volunteer.²

176. Subject to the qualifications above stated, equity will relieve when deeds or other instruments are lost, when penalties are accidentally incurred, when powers are defectively exercised, and in certain miscellaneous cases which cannot be grouped under a general head.

177. Equity, then, has, in the first place, a jurisdiction to give relief when bonds or other documents are lost,³ and the loss obstructs the right of the plaintiff at law, or leaves him exposed to undue perils in the future assertion of such rights. The *mere* loss will not be sufficient to give equity jurisdiction; but the party must show that he has no remedy or no sufficient remedy at law.

Apart from the fact that a re-execution of the instrument may be ordered,⁴ the superiority of the equitable over the legal relief is shown in many ways. In equity suitable indemnity

¹ See Smith's Land. and Ten. 202. See, also, *Fowler v. Bott*, 6 Mass. R. 63; *Hallett v. Wylie*, 3 Johns. R. 44.

² Story Eq. Jurisp., § 106, *et seq.*

³ Story Eq. Jurisp., § 84. See *Donaldson v. Williams*, 50 Missouri, 408.

⁴ The jurisdiction of equity is fre-

quently described as extending to cases of loss, destruction, or suppression of deeds; but *suppression* must be a fraud, and equity would have jurisdiction under that head. See *post*, Part III., chap. on Re-execution and Cancellation.

can always be exacted from the complainant, so that recovery upon a lost instrument may be had, and, at the same time, the defendant may be sufficiently protected against any contingent liability growing out of the subsequent discovery of the instrument, and an assertion of rights under the same by any other party. Indemnity can, indeed, be required in common law actions, especially in this country, where not only equitable principles, but also equitable practice, have been in many instances infused into the common law forms.¹ Nevertheless the ability of courts of equity to require such a stipulation is undoubted, and has been one of the grounds on which the jurisdiction in cases of accident has been supported.

An alternative decree may be framed in equity, so as to do justice either in the event of the continued loss or withholding of the instrument, or in that of its discovery or production.² Mere declaratory decrees, *i. e.*, decrees declaring the rights of parties to property, of which they are already in possession, but of which their title may be disputed, may be entered in equity. Such decrees are of course beyond the power of the common law courts, for *there* the party in possession could bring no action by which his title could be ascertained as against a threatened claim.

Profert of bonds may be dispensed with in equity; whereas at law such profert had to be made in the declaration; and the instrument produced if required. The old common law rule has indeed been altered, and a party may now *excuse* a profert, stating his excuse in the declaration.³ But equity, having acquired jurisdiction under the law as it formerly stood, still retains it in such cases.

It is one of the safeguards with which equity surrounds a defendant in the cases now under consideration, that the plaintiff must file an affidavit of the loss of the instrument.⁴ In

¹ *Bridgeford v. Masonville Manuf. Co.*, 34 Conn. 546; *Almy v. Reed*, 10 Cush. 421; *Smith v. Rockwell*, 2 Hill (N. Y.), 482; *Fales v. Russell*, 16 Pick. 315; Story Eq. Jurisp., § 82.

² Story Eq. Jurisp., § 84.

³ See Chitty's Pleading, 365.

⁴ Except in cases of bills for discovery

only; for it is presumed that no person who is in possession of the instrument would file a bill for the discovery of it, especially when the expense of a discovery all falls upon the plaintiff. Goldsmith's Doctrine of Equity, 82; Daniel's Ch. Prac. 395, 396; Story's Eq. Pldg., §

288.

some instances, it is true, relief has been afforded where the proof of loss was very clear, although no affidavit had been filed; but, as a general rule, an affidavit will be required.¹

As to promissory notes the rule seems to be, that, where the note is negotiable and is lost before it becomes due, no recovery can be had at law, and the remedy is solely in equity.² But if the note was not negotiable, or the loss happened after the note fell due, the party has a remedy at law; and as proof of a promissory note is not necessary, the remedy at law is complete, and the party has no standing in equity, unless, of course, some other and special ground is laid.

178. Another class of cases in which equity originally afforded relief, on the ground of accident, is that of penalties.

Accident is undoubtedly the origin of the jurisdiction of chancery upon the subject of penalties; but subsequently the jurisdiction was extended to embrace all questions as to penalties irrespective of accident.³

The penalty named in a bond was originally inserted for the purpose of "evading the absurdity of those monkish constitutions which prohibited taking interest for money, and was, therefore, very pardonably considered the real debt in courts of law, when the debtor neglected to perform his agreement for the return of the loan with interest; for the judges could not, as the law then stood, give judgment that the interest should be specifically paid."⁴ The reason of this rule ceased when interest was allowed by statute to be recovered; but the narrow and illiberal views which were entertained at this time, in courts of law, prevented the judges from taking advantage of this circumstance to alter the rule; and the suitor was consequently driven into chancery. The jurisdiction of chancery, as has been already stated, originally arose when the obligor was prevented by accident from paying the sum on the day named; but it was

¹ *Chewning v. Singleton*, 2 Hill Eq. 371; *Bowman*, 3 J. J. Marsh. 73; 1 Dan. Chan. Hill v. Lackey, 9 Dana, 81; *Owen v. Prac.* 395.

Paul, 16 Alab. 130; *Pennington v. The Governor*, 1 Blackf. 78; *Thornton v. Stewart*, 7 Leigh, 128; *Livingston v. Livingston*, 4 Johns. Ch. 294; *Graham v. Hackwith*, 1 A. K. Marsh. 424; *Parson's Adm. v. Wilson*, 2 Tenn. R. 260; *Webb v. Bowman*, 3 J. J. Marsh. 73; 1 Dan. Chan. ² See *Byles on Bills* (Sharswood), 800, 301, and notes; *Wright v. Maidstone*, 1 K. & J. 701; *Savannah Nat. Bank v. Haskins*, 101 Mass. 370.

³ See 1 Spence Eq. 629, 630.

⁴ 3 Black. Com. 434.

afterwards extended, and embraces all cases of default from whatever cause—upon the principle that compensation and not forfeiture is the just and equitable rule which is to be applied to all cases, and that when a debtor pays the debt with interest for its detention and costs, he ought not to be mulcted in a further sum. This reasonable rule soon found its way to the statute book, and acts of parliament were passed allowing courts of common law to afford the same relief.¹ These or similar statutes are in force generally in the United States; and the necessity for the exercise of chancery interference has, therefore, to a great extent, passed away; but its jurisdiction still remains.²

179. The question which, perhaps, most frequently arises, is whether the sum named is to be regarded as a penalty, or as the amount of damages which the parties have agreed shall be recovered in case of a breach of the covenant. Against a penalty equity will relieve; but not against stipulated (or liquidated) damages.

The mere use, however, of the words “stipulated damages,” will not determine the rule to be applied; *that* will depend upon the substantial nature of the contract.³ The general result of the authorities has been correctly stated to be, that, “when the injury is susceptible of definite admeasurement, as in all cases where the breach consists in the non-payment of money, the parties will not be allowed to make a stipulation for a greater amount, whether in the form of a penalty, or of liquidated damages. But when, on the other hand, the injury in question is uncertain in itself, and insusceptible of being reduced to certainty by a legal computation, it may be settled beforehand by special agreement.”⁴ In all cases, however, it is a question of intention.⁵

¹ 8 and 9 Wil. III., ch. 11, § 8; 4 and 5 Anne, ch. 16, §§ 12, 13. It was said, in *Betts v. Burch*, 4 Hurl. & Nor. 506, that the courts seem to have granted relief without reference to the statutes, and on general principles. See 2 Lead. Cas. Eq. 1098 (4th Eng. ed.).

² See the notes to *Peachy v. The Duke of Somerset*, 2 Lead. Cas. Eq. 1096 (4th Eng. ed.); 3 *Id.* 895 (3d Am. ed.).

³ *Hamaker v. Schroers*, 49 Missouri,

406; *Morris v. McCoy*, 7 Nevada, 399; *Lee v. Overstreet*, 44 Geo. 507; notes to *Peachey v. Duke of Somerset*, 3 Lead. Cas. Eq. (3d Am. ed.) 677.

⁴ 3 Lead. Cas. Eq. (3d Am. ed.) 683.

⁵ *Id.* See, also, *Cotheal v. Talmage*, 5 Seld. 551; *Streeper v. Williams*, 12 Wright (Pa.), 454; *Shreeve v. Brereton*, 1 P. F. Sm. 175; *Chase v. Allen*, 13 Gray, 45; *Fisk v. Gray*, 11 Allen, 132; 3 *Parsons on Contracts*, 156.

180. Another question which often presents itself for consideration is, whether an agreement for the reduction of a debt, in case of prompt payment, or the performance of some other condition, shall be governed by the ordinary rules which are applicable to penalties.

The law upon this subject, and, indeed, upon the general question of penalties, has been stated with great clearness in the case of *Thompson v. Hudson*,¹ decided in 1869, in the House of Lords. Equity, it was there said, will always look to the substance of the transaction; if the substance is inequitable, equity will relieve against it, or will not enforce it—if it is not so, equity will enforce the agreement.² The law is perfectly clear, that, where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage, or be it by way of stipulation, that, in case of its not being paid at the time appointed, a larger sum shall become payable, and be paid; in either of these cases, equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property pledged, or any augmentation of the debt as a penal provision, on the ground that equity regards the contemplated forfeiture, which might take place at law with reference to the estates, as in the nature of a penal provision, against which equity will relieve when the object in view, viz., the securing of the debt, is attained, and regarding, also, the stipulation for the payment of a larger sum of money, if the sum be not paid at the time it is due, as a penalty and a forfeiture against which equity will relieve. It is equally clear, upon the other hand, that, where there is a debt due, and an agreement is entered into at the time of that debt having become due, and not being paid, in regard to further indulgence to be conceded to the debtor, or further time to be accorded to him for the payment of the debt, or in regard to his paying it immediately, if that be a portion of the stipulations of the agreement, or at some future time which may be named, and the creditor is willing to allow him certain advantages and deductions from that debt, as well as to extend the time for its payment, if adequate

¹ L. R. 4 H. L. Cas. 1.

Palmer) and Lord Justice Mellish (then

² By Lord Selborne (then Sir Roundel Mr. Mellish), *arguendo* for appellants.

and satisfactory security is afforded him as a consideration, then it is perfectly competent to the creditor to say that if the payment is not made *modo et formâ* according to the stipulation, the right to the original debt reverts.¹ In other words, it is right and rational for a creditor to say to his debtor: "Provided you pay me half of the debt or two-thirds of the debt on an appointed day, I will release you from the rest, and will accept the money so paid in discharge of the whole debt; but if you do not make payment of it on that day, then the whole debt shall remain due to me, and I shall be at liberty to recover it;" and this is the view which a court of equity will adopt.²

In accordance with these principles, it has been decided, that, where a mortgage provides for the payment of sums by instalments, and contains a stipulation for the payment of the whole sum due in default of payment of any such instalment, such proviso is binding and not in the nature of a penalty.³

A man cannot escape from the specific performance of an agreement by electing to pay the penalty for the breach. "If a man, for instance, agrees to settle an estate, and executes his bond for a certain sum as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond, and avoid his agreement, but he will be compelled to settle his estate in specific performance of his agreement."⁴

181. The relief afforded in cases of penalties is only an in-

¹ See opinion of Lord Hatherley in L. R. 4 H. L. Cas. 15.

² Thompson v. Hudson—opinion of Lord Westbury, L. R. 4 H. L. Cas. 27. "If you were to put that proposition," said Lord Westbury, "to any plain man walking the streets of London, there could be no doubt at all that he would say that it is reasonable and accordant with common sense. But if he was told that it was requisite to go to three tribunals before you could get that plain principle and conclusion of common sense accepted as law, he would, undoubtedly, hold up his hands with astonishment at the state of the law."

³ Sterne v. Beck, 11 Weekly Rep. 791;

Robinson v. Loomis, 1 P. F. Sm. 78; The People v. The Sup. Ct. of N. Y., 19 Wend. 104; Noyes v. Clark, 7 Paige, 179; The Plank Road Co. v. Murray, 15 Ill. 337; Baldwin v. Van Vorst, 2 Stockt. Ch. 577.

⁴ Per Lord St. Leonards in French v. Macale, 2 Dr. & War. 275; Gordon v. Brown, 4 Ired. Eq. 399; Dooley v. Watson, 1 Grey, 414; Canal Co. v. Sansom, 1 Binney, 70; Brown v. Bellows, 4 Pick. 179. See, however, Perkins v. Lyman, 11 Mass. 76; Pearson v. Williams, 25 Wend. 630; Williams v. Green, 14 Ark. 315, 322; Bodine v. Glading, 9 Harris (Pa.), 50, 54; 3 Lead. Cas. Eq. 685 (3d Am. ed.).

stance of a general rule; for the same species of redress will be afforded in all cases of forfeiture resulting from non-payment of money, and in all cases where the damage incurred by non-performance is susceptible of pecuniary measurement, and, therefore, of compensation.¹ But equity will not, in general, and in the absence of special circumstances calling for interference, give relief in cases of forfeiture growing out of breach of covenant for repairing, insuring, or doing any specific act.

The ground of this difference is, that in such cases it is unknown "what the measure of damages shall be."²

It is well settled that a court of equity will not lend its aid actively to enforce a forfeiture.³

182. The third class of cases in which equity will relieve on the ground of accident embraces defective execution of powers.⁴ This subject will be more fully considered under the next head of equity jurisdiction—that, namely, of Mistake. It will be sufficient to say, at present, that in cases of accident, equity will relieve, where there is a *defective* execution of a power, but not where there is a *non-execution*, in favor of a purchaser, a creditor, a wife, a child, or a charity; but not in favor of the donee of the power, or a husband, or grandchildren, or remote relations, or strangers; and not where there are any opposing equities on the other side. Defects which are of the very

¹ Hagar v. Buck, 44 Verm. 285; Bowser v. Colby, 1 Hare, 128. See further upon this subject Gregory v. Wilson, 9 Hare, 683; Bargent v. Thompson, 4 Giff. 473; Nokes v. Gibbon, 3 Drew. 681; Hill v. Barclay, 18 Ves. 62; Bracebridge v. Buckley, 2 Price, 200.

² Wafer v. Mocato, 9 Mod. 112; Reynolds v. Pitt, 19 Ves. 141; De Scarlett v. Dennett, 9 Mod. 22; Sparks v. Liverpool Waterworks, 13 Ves. 428; Dunklee v. Adams, 20 Verm. 415. In England parties who have been guilty of a forfeiture for non-compliance with a covenant to insure are now relieved by Stat. 22 and 23 Vic., c. 35, under certain circumstances, and upon certain conditions.

³ Livingston v. Tompkins, 4 Johns. Ch. 415; Warner v. Bennett, 31 Conn. 468; Smith v. Jewett, 40 N. Hamp. 534; 4 Kent's Com. 130.

⁴ The principle upon which relief in the case of defective execution of powers rests, is said by Mr. Adams (Doctrine of Equity, 98) to be that equity will recognize a meritorious consideration, and will complete gifts made on such a consideration in favor of a donor's intention after death. This is, perhaps, a philosophical statement of the principle; the cases, however, are ordinarily referred to the two heads under which they are treated in this work, viz., Accident and Mistake.

essence of the power will not be relieved against, but mere formal defects will.

The powers here referred to are powers which have been created by way of use, and not bare authorities conferred by law.

183. Besides the cases above stated, there are a number of miscellaneous instances in which equity will give relief on the ground of accident. Thus where an administrator or executor pays debts, legacies, or distributive shares under the impression that the assets are sufficient for all demands, and it afterwards turns out, from unexpected occurrences, that the assets are insufficient; or an annuity is directed by will to be secured on public stock, and an investment is made, sufficient at the time, but afterwards rendered insufficient by action of parliament in reference to the stock; or where a testator cancels a former will upon the presumption that a later will, made by him, is duly executed, when it is not; or when boundaries have been accidentally confused; or there has been an accidental omission to endorse a promissory note: in all of the above cases, and, indeed, it may be safely said, in *any* case of accident, where the party injured has not been in default, and the party on the other side has no special equity to protect him, a court of chancery will give relief suited to each particular case, subject to the general rules already stated.¹

184. Having noticed that head of equitable jurisdiction which has been termed "Accident," the next subject requiring consideration is that of Mistake.

The jurisdiction of chancery to correct mistakes in deeds, was assumed at a very early day.² The reason for its exercise was twofold: first, because of the implied credit which courts of law gave to the seal of a party unless fraud was proved; and second, because all the relief which a court of law could possibly afford, would be to treat the instrument as a nullity, in which case the intention of the parties would, after all, be defeated in many instances; whereas in equity the instrument could be *reformed*, and the true meaning of the parties to a transaction could thus be expressed and carried out.

This reference to the superiority of the equitable *remedy* in

¹ Story's Eq. Jurisp., § 90 *et seq.*

² 1 Spence, 684.

cases of mistake naturally leads to the remark that at present the only points to be considered are those which relate to the *nature* of mistakes, their different kinds, the circumstances under which equity will afford relief, and the occasions which most frequently arise for the interposition of the chancellor. The *character* of the remedy afforded will be attempted to be explained and discussed in the chapter on Reformation and Cancellation.¹

185. A mistake exists when a person, under some erroneous conviction of law or fact, does, or omits to do, some act which but for the erroneous conviction he would not have done or omitted.² It may arise either from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence.³

Where the mistake arises from imposition or misplaced confidence, relief may be had on the ground of fraud. Where it arises from unconsciousness, ignorance, or forgetfulness, no element of fraud exists, and redress must be obtained, if obtained at all, on the distinct equitable basis of mistake.

186. The most natural division of the subject under consideration, and that which is usually made, is into Mistakes of Law, and Mistakes of Fact.

187. The general rule of the common law is that a mistake of law is no ground for relief.⁴ This principle, which is one familiar to all systems of jurisprudence, is, in the common law, embodied in the maxim "*Ignorantia legis neminem excusat.*" As a general rule the same principle may be said to exist in equity;⁵ but of late years the disposition of courts and text writers seems to be to qualify the proposition by many exceptions, and no little

¹ *Post*, Part III.

² Hayne's *Outlines of Equity*, 132.

³ Kerr on *Fraud and Mistake*, 396; Story's *Eq.*, § 110.

⁴ Manser's *Case*, 2 Coke, 3 b.

⁵ Hunt v. Rousmanier's Exrs., 8 Wheat. 174; 1 Peters, 1; 1 Am. Lead. Cas. 700; Champlin v. Laytin, 18 Wend. 407; Shotwell v. Murray, 1 Johns. Ch. 512; McMurray v. St. Louis Co., 33 Missouri, 377; Peters v. Florence, 2 Wright (Pa.), 194; Gwynn v. Hamilton, 29 Alab. 233; Smith v. McDougal, 2 Cal. 586; State v. Reigart, 1 Gill, 1; Mellish v. Robertson,

25 Verm. 603; Goltra v. Sanasack, 53 Ill. 456; Lyon v. Sanders, 23 Miss. 530; Wintermute v. Snyder, 2 Green Ch. 498; Hampton v. Nicholson, 8 C. E. Green, 427; Trigg v. Read, 5 Hump. 529; Storrs v. Barker, 6 Johns. Ch. 166; Freeman v. Curtis, 51 Maine, 140; Brown v. Armistead, 6 Rand. 594; Fergerson v. Fergerson, 1 Geo. Dec. 135; Hoover v. Reilly, 2 Abb. (U. S.) 471; See Worley v. Tuggle, 4 Bush, 168; Midland Great Western Railway Co. of Ireland, 6 H. L. Cas. 798.

difference of opinion, perhaps, exists as to whether it can now even be asserted as a general rule.¹ Perhaps a correct statement of the doctrine, as at present received, would be to say, that the maxim *ignorantia juris non excusat* is not of universal applicability in equity. The distinction has been taken between the word *jus* as used to indicate general law, and the same word as employed to denote private right.² In the former sense a mistake as to the general law is irremediable in equity, as well as at law; in the latter, a mistake in regard to individual rights may under certain circumstances be redressed. And this distinction may go far to reconcile the cases. Thus, an instance of the first class may be found in the leading case of *Hunt v. Rousmanier's Executors*, where the law upon this subject was most thoroughly discussed in the Supreme Court of the United States.³ In that case a power of attorney to execute a bill of sale of a ship was taken by a creditor from a debtor, under the distinct impression, induced by the advice of counsel, that it would be as valid a security, under all circumstances, as a mortgage. The debtor subsequently died, and as the power of attorney was revoked by his death, the security of the creditor was invalidated. It was held that the misapprehension of the parties as to the legal effect of the instrument was no ground for relief; and it was said that it would be unprecedented for a court of equity to decree another security to be given under such circumstances.

On the other hand, where the eldest of three brothers divided lands, of which the second brother had died seized, with the youngest, under the mistaken impression, confirmed by a friend of both parties who had been consulted, that land could not ascend, and that he was not therefore his brother's heir, it was held that he was entitled to relief.⁴ This case has been much criticized;⁵ but it, and similar decisions, may perhaps be reconciled with cases like *Hunt v. Rousmanier* on the principle already stated.

¹ See Story's Eq. 138 a to 138 i.

² *Cooper v. Phibbs*, L. R. 2 H. L. Cas. 170; *Kerr on Fraud and Mistake*, 398 (Bump's ed.).

³ 8 Wheat. 174; 1 Peters, 1, 3, 14. See, also, *Zollman v. Moore*, 21 Grat. 320.

⁴ *Lansdown v. Lansdown*, Mosley, 364.

⁵ *Hunt v. Rousmanier*, 1 Peters, 14, 15; Story's Eq., § 125. But Chief Justice Marshall in *Hunt v. Rousmanier*, 8 Wheat. 215, said of *Lansdown v. Lansdown*, that, "as a case in which relief has been granted on a mistake in law, it cannot be entirely disregarded."

188. But whether equity will or will not interfere in the case of a pure mistake of law, and whatever may be the true distinction to be taken between the cases, is nevertheless clear that any additional circumstances will readily be laid hold of by the court, as constituting sufficient grounds for interposition. Thus, where ignorance of the law exists on one side, and that ignorance is known and taken advantage of by the other party, the former will be relieved. More particularly will this be so if the mistake was encouraged or induced by misrepresentation of the other party.¹

Relief is sometimes given also in cases of surprise—that is, where parties have entered into arrangements unadvisedly and improvidently, and without due deliberation.² So also in some cases where the law is confessedly doubtful, and one about which ignorance may well be supposed to exist.³

189. But *compromises* of doubtful rights are favored both in equity and at law, and no relief can be had if it afterwards turns out that the right surrendered was entirely valid and capable of assertion. It has been truly said that all compromise of a right necessarily implies that the party possesses *some* right which is surrendered; and he shall not, therefore, afterwards be heard to complain, if it subsequently appears that his right was more certain and well settled than it was at first supposed to be.⁴ Family compromises, especially, if they are made in good faith and with full disclosure, are favored in equity, and may be sustained by the court, “albeit, perhaps, resting upon grounds which would not have been considered satisfactory if the transaction had occurred between strangers.”⁵

¹ Scholefield v. Templar, Johns. 166; Haden v. Ware, 15 Alab. 149; Reservoir Cooper v. Phibbs, L. R. 2 H. L. Cas. 149; Co. v. Chase, 14 Conn. 123.
Whelen's Appeal, 20 P. F. Sm. 425; ⁴ Kerr on Fraud and Mistake, 403; Wheeler v. Smith, 9 Howard, 55; Kerr Trigg v. Read, 5 Humph. 529; Good v. on Fraud and Mistake, 400. Herr, 7 Watts & Serg. 258; Taylor v.

² Pusey v. Desbouverie, 3 P. Wms. 315; Evans v. Llewellyn, 2 Bro. C. R. 150; 1 Cox, 333.

³ Cumberland Co. v. Sherman, 20 Maryl. 117; Champlin v. Laytin, 18 Wend. 407; Garner v. Garner, 1 Desaus. 437; Freeman v. Curtis, 51 Maine, 140; Moreland v. Atchison, 19 Tex. 303; Green v. Morris R. R. Co., 1 Beas. 165;

Patrick, 1 Bibb, 168; Durham v. Wadlington, 2 Strob. Eq. 258; Brandon v. Medley, 1 Jones Eq. 313; Clifton v. Cockburn, 3 My. & K. 76; Bentley v. Mackay, 31 Beav. 143; note to Stapilton v. Stapilton, 3 Lead. Cas. Eq. 411.

⁵ Westby v. Westby, 2 D. & War. 503, 525.

It appears to be settled by the authorities that money paid under a mistake of law cannot be recovered either in equity or at law.¹

The court will not interfere where the parties cannot be restored to their original position, or where the rights of *bonâ fide* purchasers, without notice, have intervened.²

190. A mistake of fact is a mistake not caused by the neglect of legal duty on the part of the person making the mistake, and consisting in an unconsciousness, ignorance, or forgetfulness of a fact past or present, material to the transaction; or in the belief in the present existence of a thing material to the transaction which does not exist, or in the past existence of a thing which has not existed.³

The mistake may consist either in the circumstance that the instrument by which the parties designed to express their intention does not so express it, or does not express it accurately; or in the circumstance that the intention of the parties, though correctly expressed, has, nevertheless, been reached through some misapprehension or ignorance. In one case the intention is erroneously expressed; in the other the intention is founded on error. The relief pertinent to the first case is correction; to the second, rescission.

Thus, where there was an agreement that part of the purchase-money of certain real estate should be paid by a judgment note for a certain sum "with interest," and the words "with interest" were omitted from the note by the mistake of the scrivener by whom it was written, it was held that this was such a mistake as equity would correct. The intention of the parties had not been accurately expressed.⁴

¹ Kerr on Fraud and Mistake, 401, 402; Currie v. Goold, 2 Mad. 164. See also Railroad Co. v. Soutter, 13 Wallace, 524; Bank of U. S. v. Daniel, 12 Peters, 32; Haven v. Foster, 9 Pick. 112; Pinkham v. Gear, 3 N. Hamp. 163; Hubbard v. Martin, 8 Yerg. 498; Ege v. Koontz, 2 Barr, 109; Miles v. Stevens, *Id.* 21; Jones v. Watkins, 1 Stew. 81; Clark v. Dutcher, 9 Cow. 674.

² Kerr on Fraud and Mistake, 436.

³ Kerr on Fraud and Mistake, 406.

⁴ Gump's Appeal, 15 P. F. Sm. 476; Talley v. Courtney, 1 Heisk. 715; Russell v. Mixer, 42 Cal. 475; Keith v. The Globe Ins. Co., 52 Ill. 518; Groff v. Rohrer, 35 Maryl. 327. See, also, Loss v. Obry, 7 C. E. Green, 52; Glass v. Hulbert, 102 Mass. 34; Stockbridge Iron Co. v. The Hudson Iron Co., *Id.* 48; Worley v. Tuggle, 4 Bush, 168; MNls v. Lockwood, 42 Ill. 111; Deford v. Mercer, 24 Iowa, 118;

On the other hand, when there is a settlement of accounts made between parties, which correctly expresses their intention, but which is founded on error, the settlement will be set aside.¹

191. The mistake, to be relieved against in equity, must be one that is mutual, material, and not induced by negligence. It must be mutual, if the complainant wishes to have the instrument *reformed* and not simply set aside, because equity cannot undertake to *reform* on the ground of the ignorance or misapprehension of *one* of the parties as to any facts, though it may rescind.² If, however, such ignorance or misapprehension was induced, or fraudulently taken advantage of, by the other party, relief will be administered, but obviously on different grounds.³ Still less can a chancellor grant redress in a case where a party finds that his motives for entering into a contract were mistaken, or his expectations unfounded.⁴

The mistake must be material, because the court will not interpose its extraordinary relief for slight errors in matters which are not of importance. As misrepresentation will not vitiate a contract unless it relates to something which is a material inducement to the party to act;⁵ so a mistake will not justify a man in seeking equitable relief if it is a mistake relating to some trivial matter, which did not substantially influence his action.⁶

A mistake will not be relieved against if it is the result of the party's own negligence.⁷ Thus if he has had a complete de-

Smith v. Jordan, 13 Minn. 264; Beaumont v. Bramley, T. & R. 41; 1 Sug. V. and P. 262 (171). Such a mistake can properly be dealt with in equity alone. Long v. Hartwell, 34 N. J. 116, 128.

¹ Adams Eq. 384; McCrae v. Hollis, 4 Desaus. 122; Russell v. The Church, 15 P. F. Sm. 9.

² Lyman v. Utica Ins. Co., 17 Johns. 377; Nevius v. Dunlap, 33 N. Y. 676; Cooper v. The Farmers' Ins. Co., 14 Wright (Pa.), 299. See, also, Bentley v. Mackay, 31 Beav. 151; Sawyer v. Hovey, 3 Allen, 331; Woodbury Savings Bank v. The Insurance Co., 81 Conn. 517; Diman v. Providence R. R. Co., 5 Rhode Island, 130; Sells v. Sells, 1 Dr. & Sm. 42; *post*,

Part III., Chap. on Reformation and Cancellation.

³ See Welles v. Yates, 44 N. Y. 525.

⁴ A court, however, may, under such circumstances, refuse to lend its aid to the other party seeking specific performance. *Post*, Part III., Chap. I.

⁵ See *post*, Chap. II.

⁶ See McFerran v. Taylor, 3 Cranch. 281 (remarks of Ch. J. Marshall); Kerr on Fraud and Mistake, 408.

⁷ Duke of Beaufort v. Neeld, 12 Cl. & Fin. 248, 286; Leuty v. Hillas, 2 DeG. & J. 110; Western R. R. Co. v. Babcock, 6 Met. 346; Ferson v. Sanger, 1 Wood. & Min. 138; Wood v. Patterson, 4 Maryl. Ch. 335; Diman v. Providence R. R. Co., 5 R. I. 130; Lamb v. Harris, 8 Geo. 546.

fence or remedy at law, he cannot if he has neglected to avail himself of it there, have any relief in equity.¹ And under the same head should be classed mistakes into which a party has fallen, because he has not made use of the means of inquiry which were open to him.²

There can be no relief on the ground of mistake when the subject matter of the contract is necessarily, and by its very nature, of a doubtful or uncertain kind.³

Nor will equity always relieve if a mistake has occurred in a family arrangement, designed to settle disputes and quiet titles. A family compromise, even if made under mistaken impressions as to facts, will not generally be disturbed. It is otherwise with compromises between strangers; for these, if based upon a mistake of fact, will be set aside.⁴

192. The occasions which call for the interposition of equity on the ground of mistake are, of course, very numerous, and it would not be possible, even if it were desirable, to enumerate them all without, in fact, giving a digest of the reported decisions under this head. There is, however, one class of cases in which the equitable doctrine is of an anomalous character, and requires particular notice, and that is the defective execution of powers. This subject was referred to under the head of accidents; and it is well established that in the case of mistake, as well as in that of accident, equity will relieve against certain defects in the execution of a power in favor of certain persons and as against others, if these latter do not stand in an equally meritorious position. It will be observed that the above statement naturally suggests the questions—First, what defects may be remedied; secondly, for whose benefit, and thirdly, as against whom?

193. And, first, what defects may be remedied? Equity will not interfere in the case of a *non-execution* of a power. It will correct defects in an attempted execution; but it will not supply an execution if none has been attempted.⁵ The reason for the

¹ Stephenson v. Wilson, 2 Vern. 325.

Ridgway v. Sneyd, Kay, 627; Baxendale

² See Kerr on Fraud and Mistake, 407; Hill v. Bush, 19 Ark. 522; Jouzan v. Toulmin, 9 Alab. 662.

v. Seale, 19 Beav. 601.

³ Mortimer v. Capper, 1 Bro. C. C. 156;

⁴ Stockley v. Stockley, 1 V. & B. 23; Kerr on Fraud and Mistake, 434.

⁵ Note to Tollet v. Tollet, 1 Lead. Cas. Eq. 234.

distinction is obvious. The jurisdiction which equity has assumed to aid in the *defective* execution of powers is based upon the theory that the donee of the power has *intended* to exercise it, but has been prevented from doing so by some accident or mistake; and equity will not, in such a case, suffer a substantial intention to be defeated for the sake of a mere form. But where there has been no exercise of the power at all, no intention to exercise it can be presumed; and, therefore, the ground for the interference of the chancellor does not exist.

The defects which will be aided in equity are of two kinds—first, where there has been an instrument executed from which an intention to exercise the power may be inferred, but the instrument itself is informal or inappropriate;¹ and, second, where there has been a defective execution of a formal and appropriate instrument.

Of the first class of defects the leading case of *Tollet v. Tollet* is an illustration. There, a power existed to make a jointure by deed. It was, in fact, made by will. It was, nevertheless, held that this exercise of the power was good.² So equity will lend its aid in many other cases in which the instrument is inappropriate, provided, always, there is a sufficient indication of the intention to exercise the power.³

Of the second class of defects which will be aided in equity, familiar instances are found in those cases in which the instrument by which the power is to be exercised is required to be executed in the presence of a certain number of witnesses, and is actually executed in the presence of a smaller number; or in which it is required to be signed and sealed, and sealing is omitted.⁴ The rule will apply to any case in which there is an appropriate instrument, but in the execution of which there has been, through accident or mistake, some informality.

¹ See *In re Dykes's Estate*, L. R. 7 Eq. 337; note to *Tollet v. Tollet*, 1 Lead. Cas. Eq. 234 (4th Eng. ed.).

² While a power of appointment by deed is well exercised by will, the converse is not the case, and a power to appoint by will cannot be exercised by deed. The reason of this is, that the donor of the power, in the latter case, is supposed to intend that the power shall be ambula-

tory during the life of the donee of the power, and that as this intention would be defeated by the execution of a deed, the power must be strictly pursued, and can be exercised only by will.

³ *Garth v. Townsend*, L. R. 7 Eq. 220.

⁴ See *Morse v. Martin*, 34 Beav. 500; Notes to *Tollet v. Tollet*, 1 Lead. Cas. Eq. 234.

194. In the second place, in considering the question, "for whose benefit will equity lend its aid," it may be stated as a general rule, that mere volunteers will not be assisted, but that aid will be given to purchasers for value, mortgagees, lessees, (for mortgagees and lessees are purchasers *pro tanto*), creditors, and persons who have a meritorious standing.¹ In this last class are included a charity,² a wife, and a legitimate child, but none others.³ Thus the execution of a power will not be aided in favor of a husband, an illegitimate child, a grandchild, a father, a mother, brother or sister, a nephew or niece, a cousin, or a settlor defectively executing a power in his own favor.⁴ In some rare cases, however, equity will lend its aid even in favor of a volunteer; as for instance, when the due execution of a power has become impossible.⁵

195. In the third place, equity will aid the defective execution of a power against a remainder-man, and also, in general, against the heir-at-law. Whether it will be aided as against an heir-at-law who is unprovided for, seems to be still undecided.⁶ It will not be aided against a *bonâ fide* purchaser for value.⁷

Equity will not lend its aid if the intention of the donee of the power will thereby be defeated. This is the reason why a power required to be exercised by will, cannot be duly exercised by deed.⁸

The equity under consideration will, it seems, be only exercised in favor of the intention of the donee of the power after his death. It will not be exercised in support of a conveyance *inter vivos*—except in the case of a purchaser for value. This seems to follow from the rule in regard to supplying surrenders of copyholds, which stands precisely on the same footing as the equity in regard to aiding defective execution of powers, and is governed by the same rules.⁹

¹ 1 Lead. Cas. Eq. 229 (4th Eng. ed.); note to Tollet v. Tollet; Schenck v. Ellingwood, 3 Edw. Ch. 175.

² Pepper's Will, 1 Pars. Eq. 436, 446, 451.

³ See Porter v. Turner, 3 Serg. & R. 114; Dennison v. Goehring, 7 Barr, 175.

⁴ 1 Lead. Cas. Eq. 231, 232.

⁵ Kerr on Fraud and Mistake, 444.

⁶ 1 Lead. Cas. Eq. 233.

⁷ Kerr on Fraud and Mistake, 443.

⁸ *Id.* 442.

⁹ The jurisdiction to supply surrenders of copyholds is no longer of importance. The cases upon the subject are, however, applicable to the subject of powers.

As to the question of what powers will be aided, it may be sufficient to remark generally that they are those created by way of use as distinguished from bare authorities conferred by law. Acts done under authorities of this latter kind—as, for example, leases or conveyances by a tenant in tail—are only binding when regular and complete.¹

While it is true, as a rule, that equity will not supply the non-execution of a power, it must be remembered that this will not apply to that particular class of powers (which have been already discussed) known as powers in trust. The exercise of such powers is obligatory; and, as has been explained in a former chapter, the non-execution by the donee is never allowed to defeat the intention of the settlor, or disappoint the beneficiaries for whose advantage the powers were created.

196. Equity has jurisdiction to correct mistakes in awards, where the mistake appears on the face of the award, or is disclosed by some contemporaneous writing, or if the arbitrator voluntarily admit a mistake, or state circumstances which show clearly that the proceedings have been erroneous; but not otherwise.²

Equity has jurisdiction to correct mistakes in wills when they are apparent on the face of the will, or are made out by a due construction of its terms.³

Equity will not grant relief in cases of mistake except upon very clear evidence.

¹ Kerr on Fraud and Mistake, 431.

² *Id.* 447, 448.

³ *Id.* 448; 1 Story's Eq. Jurisp., § 179,

183. See *Mellish v. Mellish*, 4 Ves. 45; *Grimes v. Harmon*, 35 Ind. 208.

CHAPTER II.

FRAUD.

SECTION I.

GENERAL NATURE OF FRAUD ; ACTUAL FRAUD.

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| 197. Importance and general nature of equitable jurisdiction in cases of Fraud.
198. Distinctions between the relief at law and in equity.
199. Limitations upon the jurisdiction of equity in cases of Fraud; Fraud in obtaining a will; <i>Allen v. M'Pherson</i> .
200. Concurrent jurisdiction of equity.
201. Exclusive jurisdiction.
202. Fraudulent transactions voidable, not absolutely void.
203. Within what time redress must be sought.
204. Fraudulent transactions must be adopted or set aside <i>in toto</i> .
205. General divisions of the subject of Fraud. | 206. General nature of actual fraud.
207. Matters of opinion.
208. Propectuses of projected companies; <i>Central Railway Company v. Kisch</i> .
209. Puffing; <i>Mortimer v. Bell</i> .
210. Fraud on owner of property sold at auction.
211. Matters of intention.
212. Matters of law.
213. <i>Suppressio veri</i> .
214. Knowledge of the truth or falsehood by party making the representations; classification of cases on this subject.
215. Representation must be relied on.
216. Representation must be material; <i>dolus dans locum contractui</i> .
217. Party deceived must be injured.
218. Representations by agents. |
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197. THE subject of the present chapter is that head of jurisdiction which, perhaps, more than any other in the whole range of the jurisprudence of chancery, has called forth the beneficial exercise of the powers of courts of equity. From the earliest times down to the present day, the wrongs inflicted by *covin* (to use the ancient term) have appealed with peculiar force to the conscience of chancellors; and probably no field of remedial law has more extended boundaries, or has yielded more substantial fruits of justice, than that which, in equity jurisprudence, is embraced under the title of Fraud.

While the general signification of this word (fraud) is easily understood, and, indeed, requires no explanation, it is, nevertheless, difficult to give any satisfactory definition of it in a single sentence, for the simple reason that courts of equity have always avoided circumscribing the area of their jurisdiction in such cases by precise boundaries, lest some new artifice, not thought of before, might enable a wrongdoer to escape from the power of equitable redress. "The court," said Lord Chancellor Hardwicke, in *Lawley v. Hooper*,¹ decided in 1745, "very wisely hath never laid down any general rule beyond which it will not go, lest other means for avoiding the equity of the court should be found out."

198. Fraud in equity has a wider signification than it has at law. It is true that at common law fraud is said to vitiate all transactions; rendering not only contracts, but even the most solemn acts, as, for example, the judgments of the courts, liable to be avoided.² Hence there exist many remedies at law for the purpose of redressing injuries inflicted through fraud. Such is the action of deceit; the action on the case for fraudulent misrepresentations; and all actions based on the theory of the rescission of contracts on the ground of fraud, such as suits to recover purchase-money paid, or to get back goods delivered. In many instances, a party to a transaction tainted by fraud may elect to rescind it, and recover, at law, anything of value with which he may have parted on the faith of it. A familiar illustration of the right to bring a common law action for fraudulent representation, is furnished by the action brought for falsely representing a third party to be solvent, and thereby inducing the plaintiff to trust his money or his goods with the party as to whose solvency he is thus deceived by the defendant.³ The defendant, in such a case, can be held responsible in a common law action. Actions based on the rescission of contracts are also of very frequent occur-

¹ 3 Atkyns, 278.

Gowen, 1 Nott & McC. 397, note; *Derby Turnpike Co. v. Parks*, 10 Conn. 539.

² See *Kincaid v. Conly*, Phillips Eq. 270. A private statute may be relieved against when obtained on "false suggestions," 2 Black. Com. 346; but not "a public act." See *Tyson v. School Directors*, 1 P. F. Sm. 14; *Stark v. Mc-*

³ *Pasley v. Freeman*, 2 Smith's Lead. Cas. 92. See 1 Spence Eq. 622. Actions of deceit and for false representations are in the nature of equitable actions. *Gwinther v. Gerding*, 3 Head, 201.

rence; as, for example, where a vendor delivers goods which are different in kind from those which he contracted to deliver, the purchaser may return the goods and recover the purchase-money in an action for money had and received.¹

Common law actions, however, do not touch every imaginable description of fraud, and the relief which they afford is, in many cases, entirely inadequate; whereas equity takes cognizance of every possible kind of fraud,² even where the guilty party might be supposed to be protected by a disability, such as coverture,³ and its remedies are of the most complete and searching character.

Thus equity will enjoin a party from enforcing an executory agreement; or it will order an executed agreement to be rescinded; and in each of these cases the evidence of the agreements may be ordered to be delivered up to be cancelled.⁴ Moreover, equity, in proper cases, may compel a party to make good his representations, or may order a security which has been taken in too large an amount to stand good for what is actually due thereon; or, in rescinding a contract, it may make allowances for improvements or deteriorations; or it may order bonds of indemnity to be given by either party. Equity aims, in fact, at that kind of relief which was known in the Roman law as *restitutio in integrum*—viz., a restoration of the party to the condition in which he was before the perpetration of the fraud.⁵ Besides, whenever the legal title is obtained by fraud, equity will not allow the fraudulent party to hold the beneficial interest, but will consider him as a trustee for the injured party.

¹ See notes to *Chandelor v. Lopus*, 1 Sm. Lead. Cas. 299. See *Farris v. Ware*, 60 Maine, 484.

² Except in cases of fraud in obtaining a will, where the common law courts have jurisdiction if the subject matter is realty, and the ecclesiastical courts, if it is personalty. See *Kerr on Fraud and Mistake*, 44 (Bump's ed.); *Allen v. M'Pherson*, 1 H. L. Cas. 191, *post*, page 202. It must be remembered also that equity has no cognizance of frauds as crimes; it looks at

them only in a civil point of view. Goldsmith's Doct. of Equity, 109.

³ See *Vaughan v. Vanderstegen*, 2 Drew. 379; *Schmitheimer v. Eiseman*, 7 Bush, 298.

⁴ See *Relf v. Eberly*, 23 Iowa, 467; *Jones v. Bolles*, 9 Wallace, 369. Damages occasioned by mistake or misrepresentation are recoverable in equity; *Delano v. Winsor*, 1 Cliff. C. C. 501; *Monmouth Co. Ins. Co. v. Hutchinson*, 6 C. E. Green, 117.

⁵ 1 Spence Eq. 622.

This is one of the most usual means which equity adopts for the purpose of correcting fraud; so much so, indeed, that in certain cases of fraud the injured party is treated as having an *equitable estate* in the property of which he has been defrauded. Thus, where a conveyance was made by a client to his solicitor, and the former had a right in equity to set the transaction aside, it was held that this was not a mere *right*, but an *estate* which was devisable.¹

In all these cases, the remedies afforded by equity are manifestly superior to those of the common law, and are, indeed, of such a character as would be impossible to be reached through the medium of common law forms.

When, to these remedies, we add the engine of discovery, the power of reaching the defendant's conscience, and getting at fraudulent intentions, in their most secret hiding places, we can see how much superior the redress afforded in chancery must be to that given by a purely common law tribunal.

The *methods* of relief in chancery will be considered in that portion of this treatise which is devoted to equitable remedies. What we are now concerned with is the extent and nature of the jurisdiction which equity assumes in such cases.

199. It was stated above that equity takes cognizance of every possible kind of fraud. This general remark must be subject to two qualifications. In the first place, it is now settled that equity has no jurisdiction in cases of fraud used in obtaining a will. So far as the will concerns real estate, its validity must be tested in the common law courts; so far as personalty is involved, courts of probate have jurisdiction.² Where, how-

¹ See *Gresley v. Mousley*, 4 De G. & J. 78; *Stump v. Gaby*, 2 De G. M. & G. 623.

² There are one or two early authorities the other way. See *Maundy v. Maundy*, 1 Ch. R. 66; *Goss v. Tracy*, 1 P. Wms. 287; *Welby v. Thornagh*, Pr. Ch. 123. But the doctrine stated in the text has been established for many years. See *Kerrich v. Bransby*, 7 Bro. P. C. 437; *Bennett v. Vade*, 2 Atk. 324; *Allen v. M'Pherson*, 1 H. L. Cas. 191; *Jones v. Gregory*, 2 De G. J. & Sm. 87; *Gaines v. Chew*, 2 How. 645; *Adams v. Adams*, 22 Verm. 50; *Colton v. Ross*, 2 Paige (Ch.), 396; *Hamberlin v. Terry*, 7 Howard (Miss.), 143; *Ewell v. Tidwell*, 20 Ark. 136; *Blue v. Patterson*, 1 Dev. & Bat. Ch. 457; *Hunt v. Hamilton*, 9 Dana, 90; *McDowall v. Peyton*, 2 Desaus. 313 (where, however, the court decreed that the defendant should consent to a revocation of the probate); *Burrow v. Ragland*, 6 Hump. 481. See also *Waters v. Stickney*, 12 Allen, 1; *Watson v. Bothwell*,

ever, a particular devise or bequest has been obtained through representation and promises that it would be used for the benefit of another, equity will prevent a fraud by treating the devisee or legatee as a trustee for the party intended to be benefited.¹

200. In the second place, it is to be observed that while, as a general rule, courts of equity have jurisdiction in *all* cases of fraud, they will not ordinarily exercise this jurisdiction if there is a full and adequate remedy at law.² No one, for instance, would think of filing a bill in equity in a case of a fraudulent warranty on the sale of a horse, or any fraud upon the sale of a chattel.³ Even where the jurisdiction of courts of chancery is limited to cases in which there is no "plain, adequate, and complete remedy" at law (as is the case with the federal courts, for example⁴), this provision has been held to be declaratory merely, and the jurisdiction thus conferred is to be measured by the same standard as that of ordinary courts of chancery.⁵ So far, however, as the general jurisdiction of chancery is concerned, and apart from statutory limitations, the better opinion would seem to be that the cognizance of every case of fraud, with the single exception of fraud in obtaining a will, belongs to the court of chancery even though there may be a complete remedy at law. The jurisdiction in such a case is concurrent. This is the opinion of Lord Eldon, Chancellor Kent, and Mr. Spence.⁶ The true conclusion would appear to be that equity would have the *power* to entertain a bill in such cases, but that it is not according to the usual course and practice of chancery to do so. Where, however, the remedy at law is not full and adequate, the jurisdiction

11 Alab. 650; and Perry on Trusts, § 182.

¹ Hoge v. Hoge, 1 Watts, 213. See, also, Chamberlaine v. Chamberlaine, 2 Freem. 34; Devenish v. Baines, Prec. Ch. 4; Jones v. McKee, 3 Barr, 496; 6 Barr, 428; Church v. Ruland, 14 P. F. Sm. 442; Gaither v. Gaither, 3 Maryl. Ch. 158; Perry on Trusts, § 181.

² Newham v. May, 13 Pri. 749; Russell v. Clark, 7 Cranch, 69. See, also, Piscataqua Ins. Co. v. Hill, 60 Maine, 183; Woodman v. Freeman, 25 Maine, 531, where the subject is thoroughly dis-

cussed; though see Clark v. Robinson, 58 Maine, 137.

³ Newham v. May, 13 Price, 751, 752.

⁴ The Judiciary Act of 1789, Brightly Dig. 256.

⁵ Boyce's Exrs. v. Grundy, 3 Peters, 215; Oelrichs v. Spain, 15 Wallace, 228. See Clark v. Robinson, 58 Maine, 137, and *ante*, p. 16.

⁶ See Evans v. Bicknell, 6 Ves. 182; Bacon v. Bronson, 7 Johns. Ch. 201; 1 Spence, 625. *Ante*, Introduction, Maxims in Equity.

of chancery in cases of fraud is undoubted, and where from any circumstance whatever, as for mere discovery alone, chancery has once obtained jurisdiction, it will go on and do complete justice in the case.

201. As the jurisdiction of equity embraces (with the qualifications already stated) fraud of all kinds, it affords relief in many instances in which no grounds for redress whatever exist at law. In such cases, therefore, its jurisdiction is exclusive, and the only remedy which the injured party can have is by bill in chancery.¹ Thus a great many transactions are *presumed* to be fraudulent in equity which are not so in law, where the rule is that fraud must be proved, and cannot be presumed. In equity fraud may be *inferred* from attendant circumstances; it may be presumed from the subject matter of the contract, or from the relations of the parties; or it may afford grounds for relief when it simply affects third persons not parties to the transaction. All of these heads will be considered in detail; but before doing so, it will be well to notice one or two general principles which courts of chancery have laid down in regard to frauds of all kinds.

202. And, in the first place, transactions tainted with fraud are not absolutely void, but are voidable only at the election of the injured party.² If he chooses to remain satisfied, the other party cannot complain, and the transaction will stand. Another result of the *voidable* character of fraudulent transactions is that the injured party ought to be prompt in setting the transaction aside, as equity does not encourage *laches*.³ Moreover, innocent third parties without notice may acquire rights and interests of which they cannot be deprived. A *bonâ fide* purchaser without notice for a valuable consideration, will be protected even though he claim under a grantor who has obtained the property by fraud, which would, as between the original parties, render its acquisition invalid.⁴

¹ See *Kincaid v. Conly*, Phillips Eq. 270.

² *Oakes v. Turquand*, L. R. 2 H. L. Cas. 346; *Pearsoll v. Chapin*, 8 Wright (Pa.), 9; *Wood v. Goff*, 7 Bush, 63; *Lindsley v. Ferguson*, 49 N. Y. 625.

³ *Willoughby v. Moulton*, 47 N. Hamp. 208; *Weeks v. Robie*, 42 *Id.* 316; *Akerly v. Vilas*, 21 Wis. 88; *Wilbur v. Flood*, 16 Mich. 40.

⁴ *Oakes v. Turquand* (*sup.*). See, also, *Scholefield v. Templer*, 4 De G. & J. 429.

There is, indeed, a distinction between deeds and other instruments which a man *intends* to execute, though his intention may be brought about by fraudulent means, and those which he has no intention to execute, but executes under the impression that the instrument is of a different character from what it actually is. In the latter case the instrument is absolutely void, and the law above stated in relation to voidable instruments would, in general, not apply.¹

203. The next general rule to be noticed in cases of fraud is that in equity no length of time, however great, will be a bar to the right to relief, if the injured party has been in ignorance of the fraud.² Courts of equity ordinarily act in analogy to the statute of limitations; and moreover it is a general principle that stale claims ought not to be encouraged.³ But in the case of undiscovered fraud the rule is different; and no length of time can secure those, who have benefited thereby, in the enjoyment of their gains.

204. Again, it must also be remembered that in cases of fraud, the injured party cannot repudiate the transaction, so far as it is injurious to himself, and adopt it so far as it is beneficial. He must either allow it to stand or set it aside *in toto*.⁴

205. Having premised the above general observations upon the nature of fraud and the scope of the jurisdiction in chancery based upon it, it will now be proper to consider more in detail the

¹ See *Donaldson v. Gillot*, L. R. 3 Eq. 277; *Ogilvie v. Jeaffreson*, 2 Giff. 353; *Kerr on Fraud and Mistake*, 50.

² *Charter v. Trevelyan*, 11 Cl. & Fin. 714; *Michoud v. Girod*, 4 How. 561; *Relf v. Eberly*, 23 Iowa, 467; *Cock v. Van Etten*, 12 Minn. 522. See *Vane v. Vane*, L.R. 8 Ch. App. 398, under the English Statute of Limitations of William IV.

³ See *Farnam v. Brooks*, 9 Pickering, 212; *Ward v. Van Bokkelen*, 1 Paige, 100; *Farr v. Farr*, 1 Hill (Eq.), 391; *Field v. Wilson*, 6 B. Mon. 479; *Thompson v. Blair*, 3 Murph. 593; *Bruce v. Child*, 4 Hawks, 372; *Perry v. Craig*, 3 Mis. 525 (365); *Ferris v. Henderson*, 2 Jones (Pa.), 54;

Bank of United States v. Biddle, 2 Pars. Eq. 31; *McDowell v. Goldsmith*, 2 Maryl. Ch. 370; *Harrod v. Fountleroy*, 3 J. J. Marsh. 548; *Philips v. Belden*, 2 Edw. Ch. 1; *Anderson v. Burwell*, 6 Grat. 405; *Maxwell v. Kennedy*, 8 How. 210; *Butler v. Haskell*, 4 Des. 651; *Gresley v. Mousley*, 4 De G. & J. 78; *Perry on Trusts*, § 229.

⁴ *Great Luxembourg Railway Co. v. Magnay*, 25 Beav. 594; *Farmers' Bank v. Groves*, 12 How. 51; *Kerr on Fraud and Mistake*, 52. See *Bellamy v. Sabine*, 2 Phillips, 425, for an illustration of an exceptional case.

several subdivisions of fraud, and the different instances which are found under each.

The most obvious division of fraud is into that which grows out of direct facts or circumstances of imposition, or *actual* fraud, and that which is inferred from the nature of the transaction, or the relations of the parties, and which is therefore known as *presumptive* or *constructive* fraud.

But for the purposes of convenient consideration the celebrated division made by Lord Hardwicke in the case of *Chesterfield v. Janssen*¹ is perhaps the best. That learned judge in that case divided fraud into four classes,² viz.:—

1. Fraud arising from facts and circumstances of imposition;
2. Fraud arising from the intrinsic matter of the bargain itself;
3. Fraud presumed from the circumstances and condition of the parties contracting; and
4. Fraud affecting third persons not parties to the agreement.

It will be observed that the first of these subdivisions embraces cases of *actual* fraud; the second and third include instances of *constructive* fraud; and the last has relation to third parties whom the fraud may affect.

206. As to the first of the above-mentioned heads of fraud, it may be stated as a general rule, that fraud consists in anything which is calculated to deceive, whether it be a single act or combination of circumstances, whether it be by suppression of the truth or a suggestion of what is false; whether it be by a direct falsehood, or by *innuendo*, by speech or by silence, by word of mouth or by a look or a gesture. Fraud of this kind may be defined to be any artifice by which a person is deceived to his disadvantage.³

The representations which deserve the name of fraudulent are usually said to be representations which are false in themselves, not known to be true by the party making them, reasonably

¹ 1 Atk. 301, 2 Ves. 125; 1 Lead. Cas. Eq. 428 (541, 4th Eng. ed.).

² The division is in fact into *five* classes; but the last class, that of reversioners, is said by Lord Hardwicke himself to be properly compounded of the others.

³ See *Jouzan v. Toulmin*, 9 Alab. 684; *Smith v. Richards*, 13 Peters, 36; *Laidlaw v. Organ*, 2 Wheat. 195; *Tyler v. Black*, 18 How. 231.

relied upon by the other party, and furnishing a substantial inducement to his action.¹

207. The representation must, in the first instance, be false in point of fact, and it necessarily follows that it must be a representation of that which is a matter of fact,² and not a mere matter of opinion or judgment.³ No man can be held responsible for an error or mistake in his opinion, unless his language amounts to a warranty, and no one is entitled to rely upon anything which must of necessity be a matter of opinion. A man who is dealing with another has a right to rest upon an assertion of a *fact* made by the latter;⁴ but he has no right to rely upon the latter's opinion, unless indeed he is an expert, in which case the parties do not deal upon equal terms, and the ordinary rule does not apply.

Nor is it a fraud for a man to praise his own wares and extol their value, and to depreciate that which he is to receive in return.⁵ Such exaggerations are common in all sales or barter; and every man has a right to praise the commodity which he

¹ In Adams's Equity, p. 176, the rule is laid down that the representations must be false in themselves, false to the knowledge of the party making them, reasonably relied upon by the other party, and furnishing a substantial inducement to the contract. In *Masterton v. Beers*, 1 Sweeney, 406, it was said that to rescind a contract the complainant must establish, 1st, the representation and its falsity; 2d, that he relied upon such representation, and was deceived thereby; and 3d, that it was material to the subject matter of the contract. In *Byard v. Holmes*, 5 Vroom, 297, the requisites were stated to be, 1st, that the defendant made some representation to the complainant, meaning that he should act upon it; 2d, that such representation was false, and that the defendant when he made it knew it to be false; and 3d, that the plaintiff believed such representation to be true, acted upon it, and was thereby injured.

It will be seen, however (*post*, page 212),

that the second of the requisites in Adams's Equity and in *Byard v. Holmes* is not quite accurately stated, as, according to the best considered modern authorities, a man has no more right to assert as a fact that which he does not know to be true, than to state that which he knows to be false. See, also, *Hubbell v. Meigs*, 50 N. Y. 489. A man is responsible for a false representation, even though he has no interest in the deception; *Wied v. Case*, 55 Barb. 547.

² Leake on Contracts, 182.

³ See *Hazard v. Irwin*, 18 Pick. 105; *Curry v. Keyser*, 30 Ind. 214. For cases illustrative of misrepresentations of fact, see *Tyler v. Black*, 13 Howard, 230; *Bennett v. Judson*, 21 New York, 238; *Manning v. Albee*, 11 Allen, 522.

⁴ See *Mead v. Bunn*, 32 N. Y. 295.

⁵ *French v. Griffin*, 3 C. E. Green, 279; 2 Kent's Com. 485; Leake on Contracts, 183.

offers, provided he does not overstep the line, and assert that as a fact which is untrue, or enter into a warranty, or make a representation which is so far connected with the contract as to enter into and form part of it.¹ A man, for example, who is selling a rope, may say that the rope is a good rope, and that he believes that it will stand the strain of a heavy weight, and he cannot be held responsible if the event is otherwise. But if he were to say that the rope had been tested with so many pounds weight, when in point of fact it had not;² or were to warrant the rope to be of a particular quality, and it was not of that quality; or were to assert that it was fit for the particular purpose for which the purchaser was buying it, and it were to turn out to be unsuited for that purpose: in all such cases the vendor would be entitled to have the contract rescinded.³

A party should not state as a *fact*, *i. e.*, as a matter of actual knowledge, that as to which he has only an opinion or belief.

208. The rules in regard to fairness in representations are to be observed in prospectuses of projected companies. The utmost candor and honesty ought to characterize such public statements. Those who issue a prospectus holding out to the public the great

¹ See *Haygarth v. Wearing*, L. R. 12 Eq. 327, where false representations as to the *value* of an estate, made by the purchaser, and relied upon by the vendor, were held sufficient to justify an application to rescind the sale. "This was not a mere purchaser's assessment," said Vice Chancellor Sir John Wickens, "but a deliberate statement made to her (the vendor) for her guidance in the transaction, and was acted on by her in reliance on its good faith and accuracy." See the next note.

² See *Sieveking v. Litzler*, 31 Ind. 17, where it was held, that, while mere assertions as to the *value* of the mill, which was the subject of the sale, would not have been any foundation for relief, yet a false statement that the mill could saw a certain number of feet of lumber *per diem*, was a ground for rescission. To the same effect are *Coon v. Atwell*, 46 N.

Hamp. 510; and *Martin v. Jordan*, 60 Maine, 531. But representations as to the original *cost* of the property, where there is no fiduciary relation between the parties, have been held, in some cases, to furnish no ground for a rescission. *Holbrook v. Connor*, 60 Maine, 578; *Hemmer v. Cooper*, 8 Allen, 334; *Mooney v. Miller*, 102 Mass. 220; *Cooper v. Lovering*, 106 Mass. 79. See, however, the dissenting opinion of Mr. Justice Dickerson in *Holbrook v. Conner*. But it will be observed that in *Bagshaw v. Seymour*, 4 C. B. (N. S.) 873, and *Clarke v. Dickson*, 6 *Id.* 453 (referred to by that learned judge), there existed a fiduciary relation.

³ The whole subject of the right to rescind contracts of the sale of personal chattels for misrepresentations will be found discussed in the note to *Chandelor v. Lopus*, 1 Smith's Lead. Cas. 299.

advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares upon the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as a fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as an inducement to take shares.¹ If it can be shown that a material representation, which is not true, is contained in the prospectus, or in any document forming the foundation of the contract between the company and the shareholder, and the shareholder comes within a reasonable time, and under proper circumstances, to be released from that contract, the courts are bound to relieve him from it.²

209. There is, however, a species of representation as to value which is fraudulent, and that is what is known as puffing at auctions. Puffing is where a fictitious competition is got up by the false bidding of one or more persons, by which real bidders are misled, and are induced by the false appearance of a demand, which does not actually exist, to make their offers. Such a sale cannot be enforced.³ The rule at law in such cases, singular to say, seems to be more strict against fraud than that in equity. Where the conditions of sale contain the usual provision, that the highest bidder shall be the purchaser, courts of law have held that no bidding whatever on behalf of the vendor—even by a single agent—is allowable. But in equity, it has been in some cases laid down as the rule, that a vendor may authorize a person to bid for him up to a reserved price, so as to prevent the

¹ *New Brunswick, etc., Railway Co. v. McClellan v. Scott*, 24 Wis. 81; *Muggeridge*, 1 Dr. & Sm. 363; *Directors of Central Railway Co. of Venezuela v. Kisch*, L. R. 2 H. L. Cas. 113. It was, however, said by Lord Justice Turner, that in cases of this kind "allowance must be made for some latitude of statement;" 3 De G. J. & S. 135. See, also, *Hallows v. Fernie*, L. R. 3 Ch. App. 475.

² *Smith's Case*, L. R. 2 Ch. App. 609. See, also, *Paddock v. Fletcher*, 42 Verm.

389; *Bagshaw v. Seymour*, 4 C. B. (N. S.) 873; *Clarke v. Dickson*, 6 *Id.* 453.

³ *Veazie v. Williams*, 8 Howard, 134; *Pennock's Appeal*, 2 Harris (Penna.), 449; *Staines v. Shore*, 4 *Id.* 200; *Towle v. Leavitt*, 3 Foster, 360; *Woods v. Hall*, 1 Dev. Eq. 411; *Trust v. Delaplaine*, 3 E. D. Smith, 219; *Kerr on Fraud and Mistake*, 225.

property from going below that price.¹ But the present inclination of the courts is, perhaps, to make the rule in equity conform to that at law.² If, therefore, the vendor does not wish the property to be sacrificed, he must limit it—in which case, if the limit is not reached by *bonâ fide* bids, the subject of the sale may be withdrawn.

210. As, on the one hand, a sale at auction may be fraudulent as against the purchaser, by reason of the enhancement of the price by means of fictitious bids; so, on the other hand, it may be fraudulent as against the owner of the property, when parties are deterred from bidding by false representations. Thus the owner of property sold at a judicial sale, has a right to come into equity for relief, when it appears that the purchaser made untrue representations whereby other persons were prevented from bidding, and by which the property was obtained at an undervalue.³

In such cases the purchaser will be treated as a trustee, and cannot retain the property, thus fraudulently acquired, for his own benefit.⁴

211. The representation must not be an expression of *intention* merely. A man has no right to rely upon what another says he intends to do;⁵ unless, indeed, the expression of intention assumes such a shape that it amounts to a contract, when, of course, the party will be bound by his engagement.⁶ But if the representation amounts to a statement of fact, although dependent upon future action, it may, if fraudulently made, furnish ground for equitable relief.⁷

¹ *Davis v. Petway*, 3 Head, 667. The general subject is discussed in this case, and *puffing* is disapproved; although the sale under consideration was sustained.

² *Mortimer v. Bell*, L. R. 1 Ch. App. 12, 13. See, also, *Woodward v. Miller*, 2 Coll. 279.

³ *Cocks v. Izard*, 7 Wal. 559.

⁴ See *Brown v. Dysinger*, 1 Rawle, 408; *Cook v. Cook*, 19 P. F. Sm. 443; *Seylar v. Carson*, *Id.* 81; *Bethell v. Sharp*, 25 Ill. 673; *Ryan v. Dox*, 34 N. York, 307; *Roach v. Hudson*, 8 Bush, 410; *Grumley v. Webb*, 44 Mis. 444; *Mackey v. Martin*, 26 Tex. 57.

⁵ *Feret v. Hill*, 15 C. B. 207; *Jordan v. Money*, 5 H. L. Cas. 185 (though see the dissenting opinion of Lord St. Leonards, *Id.* 248, 249); *Grove v. Hodges*, 5 P. F. Sm. 519; *Leake on Contracts*, 182.

⁶ *Hammersley v. De Biel*, 12 Cl. & Fin. 45. See, also, *Maunsell v. White*, 4 H. L. 1056; *Caton v. Caton*, L. R. 2 H. L. 127; *Kerr on Fraud and Mistake*, 89; *Perry on Trusts*, § 208.

⁷ *Piggott v. Stratton*, Johns. 359; 1 De G. F. & J. 49.

212. A false representation of a matter of law is no reason for rescinding a contract, because every person is supposed to know the law.¹ Where, indeed, there is a mutual *mistake* in regard to the effect of a legal instrument; or where the relations of the parties are such that the injured party relies upon the other, the rule may be different. But the relief afforded in cases of this kind depends upon other heads of equity—viz., upon *mistake*, or upon fraud arising from the relation of the parties, the former of which has been already noticed.² In the present connection, the rule must be stated to be, that misrepresentations of the law, apart from other considerations, do not constitute fraud in its technical sense, either at law or in equity.

213. It has been already stated that fraud may consist in silence as well as in actual, outspoken misrepresentation. The *suppressio veri*, whenever it becomes the means of deceit, is regarded with disfavor in equity, no less than the *suggestio falsi*. It is very true that a man is not always obliged to speak out. Under ordinary circumstances a vendor and a purchaser stand at arms' length, and the former is not obliged at law or in equity, no matter what the rule of morality may be, to disclose latent defects in the subject matter of the sale; nor is the purchaser bound to inform the seller of advantages known only to himself.³ Lord Thurlow, as an illustration of this doctrine, put the case of a man buying land under which there was a mine, known only to the purchaser, and said that the latter was not bound to disclose his knowledge.⁴ Singular to say, such a case actually arose in Pennsylvania, and the dictum of Lord Thurlow was followed.⁵

If, however, a man professes to describe the article which he is selling, he must describe everything that is material. If he professes to tell the truth, it will not do for him to tell only part of the truth.⁶

Nor can a man remain silent if it is his duty to speak. Sup-

¹ Kerr on Fraud and Mistake, 90; Leake on Contracts, 182. See Reed v. Sidener, 32 Ind. 373; Steamboat Belfast v. Born, 41 Alab. 68; Drake v. Latham, 50 Ill. 270.

² *Supra*, page 191.

³ See Laidlaw v. Organ, 2 Wheat. 178; Kintzing v. McElrath, 6 Barr, 467.

⁴ Turner v. Harvey, Jac. 169, 178.

⁵ Harris v. Tyson, 12 Harris (Pa.), 347.

⁶ Kerr on Fraud and Mistake, 91 and 92.

pression of the truth in such a case is a fraud.¹ Familiar illustrations of this principle are found in the contracts of insurance and suretyship, where from the situation of the parties the duty of disclosure is greater than in ordinary cases.²

214. The second of the requisites necessary to render a representation fraudulent was formerly said to be, that it must be false within the knowledge of the party making it. But this statement is not, under the more modern authorities, entirely accurate; for a man, it is said, must be held responsible for asserting that which he does not know to be true, as much as if he designedly asserted that which he knew to be false, provided that the assertion has the effect of deceiving the other party.³

Where a man knows that what he says is untrue, the case is, of course, a very plain one. He must be answerable, even if the assertion of the untruth were made with good intentions and without designing any fraud.⁴ The difficult cases are those in which the party does not know that his representations are untrue. Several different classes of cases may arise under this head.

Thus, in the first place, a party may be in entire ignorance, whether his assertion is, in point of fact, true or false. Here the party may, in one sense, be said not to know that his assertion is false, for *non constat* but that it may turn out to be true. But the sounder doctrine is, that a man has no right wilfully to assert as a fact that of which he is in entire ignorance. Such reckless assertions ought to render him responsible both in morals and law. A man must have reasonable grounds

¹ See *Young v. Bumpass*, 1 Freem. Ch. 241; *Kerr on Fraud and Mistake*, 95; *Leake on Contracts*, 184.

² See *Carter v. Boehm*, 3 Burr. 1905; 1 Sm. Lead. Cas. pt. 2, 834, and notes thereto; notes to *Locke v. American Ins. Co.*, 2 Am. Lead. Cas. 926; *Leake on Contracts*, 199; *Perry on Trusts*, § 179.

³ *Pulsford v. Richards*, 17 Beav. 87; *Hough v. Richardson*, 3 Story, 659; *Smith v. Richards*, 13 Pet. 26; *Bennett v. Judson*, 21 N. Y. 238; *Marsh v. Fal-ker*, 40 N. Y. 562; *Hunt v. Moore*, 2 Barr, 105; *Taymen v. Mitchell*, 1 Maryl. Ch. 496; *Reese v. Wyman*, 9 Geo. 439; *Turnbull v. Gadsden*, 2 Strob. Eq. 14; *Lewis v. McLemore*, 10 Yerg. 206; *Thompson v. Lee*, 31 Alab. 292; *Oswald v. McGehee*, 28 Miss. 340; *York v. Gregg*, 9 Tex. 85; *Hill on Trustees*, 226 (4th Am. ed.); *Leake on Contracts*, 188, 189.

⁴ *Polhill v. Walter*, 3 B. & Ad. 114; *Bankhead v. Alloway*, 6 Cold. 75; *Leake on Contracts*, 187.

for believing the truth of what he says. It is, in law, a wilful falsehood for a man to assert of his own knowledge a matter of which he has no knowledge.¹

Again, a man may honestly believe, upon reasonable grounds, that what he asserts is true, when, in point of fact, it may turn out to be otherwise. The party in such a case is not liable. No man can be held responsible for a misrepresentation made through an honest mistake.² No fraudulent intention can be imputed in such a case.³ If, however, he afterwards discovers the untruth, he must not allow the other party to act on the belief that no mistake has been made. To do so would be fraud.⁴

But again, a party *may* be held responsible, even for an honest mistake, if the *duty* of knowing the truth is for any reason cast upon him. In such a case, mistake, ignorance, or forgetfulness is no excuse.⁵

In all of these cases, the question is whether a fraudulent intent is to be imputed to the person making the representation.

If a person asserts what he does not know to be true, fraud is presumed in law, even if no actual fraud was intended.

If the assertion is honestly believed to be true, no fraudulent intent will be presumed.

If it is the *duty* of the party to know the truth, a misrepresentation will be presumed to be fraudulent.

215. The third requisite necessary to render a misrepresentation fraudulent, is that it must be reasonably relied on by the other party, and this obviously includes two subdivisions; first, the party must have *a right*, as a reasonable being, to rely upon the representation; and, secondly, he must, in point of fact, so

¹ Hazard v. Irwin, 18 Pick. 95; Stone v. Denny, 4 Metc. 151; Kerr on Fraud and Mistake, 54.

² See Fisher v. Millen, 103 Mass. 503; Cabot v. Christie, 42 Verm. 126; Kerr on Fraud and Mistake, 57. That class of cases must be put out of consideration, in which the mistake is one which relates to the substance of the contract. Thus, if a man were to sell a horse under the honest belief that he was alive at the time of the

sale, when, in point of fact, it should afterwards turn out that the horse was dead, the purchaser would, of course, be entitled to have the contract rescinded.

³ Leake on Contracts, 187. See, however, Bankhead v. Alloway, 6 Cold. 75.

⁴ Reynell v. Sprye, 1 De G. M. & G. 660; Kerr on Fraud and Mistake, 67.

⁵ Burrowes v. Lock, 10 Ves. 470; Kerr on Fraud and Mistake, 69.

rely upon it. No man, for example, would be heard to complain of a representation so wildly extravagant and so palpably absurd and false that no reasonable human being could possibly be deceived thereby;¹ nor could a contract be rescinded on the ground of a false representation, if its falsity were known to the party to whom it was made.

If the party to whom the representation is made resorts to inquiries on his own account, and shows, by his conduct, that he relies upon them, he cannot complain of any falsehood in the representation.² *A fortiori* if he was actually aware of the true state of the case—for then he was not deceived.³ And a man is bound to make use of the means of information.⁴ But if the parties do not deal upon equal terms, as if one has better means of knowledge than the other; or, if any artifice is used for the purpose of preventing inquiry; the transaction will be fraudulent.⁵

216. The last requisite to a fraudulent representation is that it must furnish a substantial inducement to the contract, in other words, it must be material. In the language of the civil law, it must be *dolus dans locum contractui*. The test is whether the party would have entered into the contract if the fraudulent representation had not been made.⁶

But trifling and immaterial misrepresentations will not induce a court of equity to interfere.⁷

217. The definition of actual fraud already given is, that it is an artifice by which a person is deceived to his *disadvantage*. The

¹ See opinion of Shipley, J., in *Irving v. Thomas*, 18 Maine, 418, 424.

² *Attwood v. Small*, 6 Cl. & Fin. 232, 336; *Jennings v. Broughton*, 17 Beav. 234; 5 De G. M. & G. 126, 136; *Clark v. Everhart*, 13 P. F. Sm. 347. See, also, *Tindall v. Harkinson*, 19 Georgia, 448; *Bell v. Henderson*, 6 Howard (Miss.), 311; *Glasscock v. Minor*, 11 Missouri, 655; *Yeates v. Pryor*, 6 Eng. 68; *Pratt v. Philbrook*, 33 Maine, 17.

³ *Hough v. Richardson*, 3 Story, 659; *Veasey v. Doton*, 3 Allen, 380; *Kerr on Fraud and Mistake*, 75, *et seq.*

⁴ *Wright v. Gully*, 28 Ind. 475; *Clark*

v. Everhart, 13 P. F. Sm. 347; *Brown v. Leach*, 107 Mass. 364.

⁵ See *Mead v. Bunn*, 32 N. Y. 275.

⁶ *Pulsford v. Richards*, 17 Beav. 87, 96; *Morris Canal Co. v. Emmett*, 9 Paige, 168; *Masterton v. Beers*, 6 Robertson, 368; 1 Sweeney, 406; *Bryan v. Hitchcock*, 43 Mis. 531; *Kloppenstein v. Mulcahy*, 4 Nev. 296; *Daniel v. Mitchell*, 1 Story, 172; 2 *Parsons on Contracts*, 267; *Kerr on Fraud and Mistake*, 73, 74.

⁷ See *Geddes v. Pennington*, 5 Dow, 159; *Winston v. Gwathmey*, 8 B. Mon. 19; *Perry on Trusts*, § 174.

emphasis upon the last word in the definition indicates that one other element of a fraudulent misrepresentation yet remains to be noticed, viz., that the party complaining must have been injured thereby. Fraud without damage is no ground for relief at law or in equity.¹ But any damage, however small, will be enough to set the court in motion.²

It must be remembered in considering all the rules in regard to misrepresentation, that, although a misrepresentation is usually by words, it is not always so, and that deceit by acts will be equally a ground for relief.³

218. If false and fraudulent representations are made by an agent, the principal cannot derive any benefit from the transaction founded on such misrepresentation.⁴ He must either repudiate the whole transaction; or, if he adopts it, he must be answerable for his agent's conduct.⁵

SECTION II.

FRAUD ARISING FROM THE INTRINSIC NATURE OF THE TRANSACTION.

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| <p>219. Contracts void by reason of their terms; Inadequacy of consideration.</p> <p>220. Bargains by reversioners and expectant heirs.</p> <p>221. Change of the law in England.</p> <p>222. Usurious contracts.</p> <p>223. Gambling contracts.</p> <p>224. Contracts void by reason of their</p> | <p>subject matter; <i>Ex turpi causâ non oritur actio</i>.</p> <p>225. Gifts in restraint of marriage; rule of the Roman Law.</p> <p>226. Conditions in general restraint of marriage.</p> <p>227. Conditions in partial restraint.</p> <p>228. Contracts in restraint of trade.</p> <p>229. Sales of public offices.</p> |
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219. The second of the classes into which frauds were divided in *Chesterfield v. Janssen*, embraces those cases in which fraud is

¹ *Clarke v. White*, 12 Peters, 178; *v. Whitmore*, 9 H. L. Cas. 418. See, also, *Abbey v. Dewey*, 1 Casey, 413; Kerr on Fraud and Mistake, 94. *Mundorff v. Wickersham*, 13 P. F. Sm. 89; *Elwell v. Chamberlin*, 31 N. Y. 611;

² *Smith v. Kay*, 7 H. L. Cas. 750, 775. *Concord Bank v. Gregg*, 14 N. Hamp.

³ *Crawshay v. Thoruton*, 4 M. & G. 387; Kerr on Injunctions, 474. 331; Kerr on Fraud and Mistake, 111.

⁴ See remarks of Lord Westbury in *New Brunswick Railway Co. v. Conybeare*, 9 H. L. Cas. 726, and by Lord Cranworth, *Id* 739; and of Lord Kingsdown in *Bristow* 129. The case of *Cornfoot v. Fowke*, 6 Mees. & Wels. 358, can scarcely now be considered law.

⁵ See *Fitzsimmons v. Joslin*, 21 Verm.

presumed to arise from the intrinsic nature and subject of the transaction itself, without any violation of fiduciary relations.

A transaction may be inherently fraudulent—that is to say, its fraudulent character may be inferred from its very nature—for one of two reasons, either, first, because of its *terms*; or secondly, because of its *subject matter*.¹

And, first, a contract may be inherently fraudulent from its very terms. Of contracts of this kind, instances will be found in those cases in which inadequacy of consideration sometimes justifies a rescission.

Ordinarily inadequacy of consideration will be insufficient to set a bargain aside, or to justify a refusal to enforce its specific performance.² Where, however, the inadequacy is so great as to “shock the conscience” (which is the phrase usually employed), the contract may be rescinded. Cases, indeed, very rarely occur in which inadequacy of consideration exists alone as a ground for rescission; for it is but seldom that a man would make a bargain of such a character, unless he were deceived by actual fraud, or were deficient in intellect, or were subject to undue influence, all of which circumstances would of themselves call for equitable interposition.³ A case, therefore, of fraud from inadequacy of consideration, pure and simple, and unmixed with any other kind of fraud, is of very rare occurrence. Nevertheless the rule must be considered as well settled, although rather by dicta than by decisions, that a transaction will be set aside if there is “an inequality so strong, gross, and manifest, that it must be im-

¹ It will be observed that many of the contracts which are discussed in this section are of an *illegal*, rather than of a strictly *fraudulent* nature. The relief, however, which equity affords in such cases is usually considered as falling under the head of fraud (see 1 Story's Eq. Jurisp., chap. vii.), and is, therefore, so treated in the present work.

² *Harrison v. Guest*, 6 De G. M. & G. 424; 8 H. L. Cas. 481; *Erwin v. Parham*, 12 Hqw. 197; *Slater v. Maxwell*, 6 Wallace, 273; *Osgood v. Franklin*, 2 Johns. Ch. 1, 23; *Bedel v. Loomis*, 11 N. Hamp.

9; *Park v. Johnson*, 4 Allen, 259; *Lee v. Kirby*, 104 Mass. 420, 428; *Seymour v. Delancy*, 8 Cowen, 445; *Wintermute v. Snyder*, 2 Green, Ch. 489; *Shepherd v. Bevin*, 9 Gill, 32; *Cribbins v. Markwood*, 13 Grat. 495; *Butler v. Haskell*, 4 Desaus. 651; *White v. Flora*, 2 Tenn. 426; *January v. Martin*, 1 Bibb, 586; *Steele v. Worthington*, 2 Ohio, 182; *Warner v. Daniels*, 1 Wood. & Min. 92; 1 Sugden V. and P. (8th Am. ed.) 419.

³ See *Haygarth v. Wearing*, L. R. 12 Eq. 320.

possible to state it to a man of common sense without producing an exclamation at the inequality of it."¹

The relief, however, in such cases is granted (it is said) not on the ground of inadequacy of consideration, but on the ground of fraud as evidenced thereby.²

Equity, moreover, will sometimes refuse to enforce the specific performance of a contract, where the consideration is grossly inadequate, although it might not interfere to rescind the contract if executed.³

220. There was, however, until recently, an important class of cases in which inadequacy of consideration has been held sufficient to set the contract aside, although it may not amount to that gross and shocking inequality mentioned above.

These are cases of sales of their interests by heirs and reversioners.⁴ The law upon the subject was altered by statute of 31 & 32 Vic., c. 4; but as the former English doctrines have been considered and adopted in several decisions in this country, it will be proper to notice them. Heirs and reversioners were supposed in the eye of the law to be so liable to imposition, and to be so exposed to chances of being induced to make hard and unfair agreements touching the disposition of their expectant interests, that it has been deemed a matter of policy to lay it down as a general rule, that he who deals with them has cast upon him the burden of showing that the purchase was a fair one, and the price paid a reasonable sum, and of the full value.

Heirs and reversioners are very often driven by great distress to make these bargains, and those who deal with them are prone to take an inequitable advantage of their condition, and the parties do not stand upon equal terms. It has, therefore, been.

¹ Per Lord Thurlow in *Gwynne v. Heaton*, 1 Bro. C. C. 8. See, also, *James v. Morgan*, 1 Lev. 111 (the horse-shoe case); *Summers v. Griffiths*, 35 Beav. 27; *Byers v. Surget*, 19 Howard, 303; *Eyre v. Potter*, 15 *Id.* 60; *Osgood v. Franklin*, 2 Johns. Ch. 1; *Morriso v. Philliber*, 30 Missouri, 145; *Gifford v. Thorn*, 1 Stock. 702; *Butler v. Haskell*, 4 Desaus. 651; *Sime v. Norris*, 8 Philada. R. 84; *Coffee v. Ruffin*, 4 Cold. 507.

² Kerr on Fraud and Mistake, 187.

³ See *Graham v. Pancoast*, 6 Casey, 97; *Osgood v. Franklin*, 2 Johns. Ch. 123; *Eastman v. Plumer*, 46 New Hamp. 464; though see *Powers v. Mayo*, 97 Mass. 180.

⁴ See *Webster v. Cook*, L. R. 2 Ch. App. 546. Though in some cases it has been held that the rule stated in the text does not apply to reversioners. *Cribbins v. Markwood*, 13 Grat. 495.

found necessary to lay down the rule, that in all these transactions distress and consequent inequality will be presumed to exist, and the *onus* of proving that the price is an adequate one is thrown on the purchaser.¹

It was at one time held that the circumstance that the father knew of the design of the son to dispose of his expectant interest, and did not oppose the same, would alter the general rules, and render the transaction unimpeachable.² But the truer doctrine seems to be that the right to set the transaction aside is the son's equity, and cannot be taken away from him by any knowledge or consent on the part of the father.³

Where there is a family arrangement made between father and son in regard to the disposition of the reversionary interest, in which no undue influence appears to have been used, the transaction will be upheld.⁴

Sales of reversionary interests may be made at auction, or, it seems, after a fair valuation;⁵ and the rule as to the voidability of these contracts does not apply in cases where the holder of the particular estate joins with the reversioner, for *there*, both owners constitute, as it were, one party controlling the whole fee, and dealing with the purchaser on equal terms.⁶

221. It was stated above that the law upon the subject of sales by reversioners has recently been altered in England. This was effected by Stat. 31 & 32 Vic., c. 4, by which it was enacted

¹ *Shelly v. Nash*, 3 Maddocks, 235; *Earl of Aylesford v. Morris*, L. R. 8 Ch. App. 490; *Savery v. King*, 5 H. L. Cas. 627; *Edwards v. Burt*, 2 De G. M. & G. 55. See, also, *Jenkins v. Pye*, 12 Pet. 241; *Butler v. Haskill*, 4 Desaus. 651; *Boynton v. Hubbard*, 7 Mass. 112; *Poor v. Hazleton*, 15 N. Hamp. 564; *Larrabee v. Larrabee*, 34 Maine, 477; *Powers's Appeal*, 13 P. F. Sm. 443; *Mastin v. Marlow*, 65 N. C. 695; *Lowry v. Spear*, 7 Bush, 451; *Varick v. Edmunds*, 1 Hoff. Ch. 382; *Fitch v. Fitch*, 8 Pick. 480; *Trull v. Eastman*, 3 Met. 121; *Nimmo v. Davis*, 7 Tex. 26; *Needles v. Needles*, 7 Ohio N. S. 432; *Notes to Chesterfield v. Janssen*, 1 Lead. Cas. Eq. 428; 1 Sug. V. and P. 426 (8th Am. ed.). In some cases the court will direct an inquiry as to the value of the reversionary interest. 1 Sug. V. and P. 427.

² *King v. Hamlet*, 2 My. & K. 456, approved in 3 C. & F. 218.

³ See the remarks of Lord Chancellor Selborne in *Earl of Aylesford v. Morris*, L. R. 8 Ch. App. 491; Sugden, V. and P. 316 (11th ed.). Note to *Chesterfield v. Janssen*, 1 Lead. Cas. Eq. 485.

⁴ *Tweddell v. Tweddell*, T. & R. 13; 1 Sug. V. and P. 427 (8th Am. ed.).

⁵ *Shelly v. Nash*, 3 Mad. 232; *Lord v. Jeffkins*, 35 Beav. 7.

⁶ See notes to *Chesterfield v. Janssen*, 1 Lead. Cas. Eq. 605 (4th Eng. ed.).

that no purchase made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall be hereafter opened or set aside merely on the ground of under-value. Under a proper construction of the language of this act, however, it has been held that the exception in the statute leaves *unfair* dealings untouched, and that the statute has not repealed the doctrines of the court of chancery, by which protection is thrown around unwary young men in the hands of unscrupulous persons, ready to take advantage of their necessities.¹

222. Another class of contracts which are fraudulent because of their terms, are contracts which stipulate for usury. Usury is defined to be an exorbitant profit for the use of money;² and it is a subject which, in most countries, is regulated by statute.

No usury laws now exist in England, having been repealed by statute. It has, nevertheless been decided that the repeal of these laws did not alter the doctrine by which the court of chancery affords relief against improvident and extravagant bargains.³

By the former English acts contracts tainted with usury were absolutely void. In some of the United States the usurious excess over the lawful rate alone is void.

Courts of equity, following the rule of law laid down by the statute, will not assist a lender to enforce a usurious contract;⁴ and it will, on the other hand, aid the borrower to recover back the amount paid for usurious interest, or may decree a surrender of securities left as collateral for a usurious debt.⁵

But if the borrower, before repayment of the loan, comes into court to have the transaction set aside, the court will afford relief only upon condition of paying the amount actually due, *i. e.*, the principal sum borrowed with lawful interest.⁶

Equity will also relieve in cases where the usurious loan assumes the appearance of a sale. The goods in such a transaction are usually taken by the borrower at an exorbitant rate on

¹ *Miller v. Cook*, L. R. 10 Eq. 641; *Tyler v. Yates*, L. R. 6 Ch. App. 665; *Earl of Aylesford v. Morris*, L. R. 8 Ch. App. 484.

² 2 Black. Com. 456.

³ *Earl of Aylesford v. Morris*, L. R. 8 Ch. App. 484. See, also, *Sime v. Norris*, 8 Philada. R. 84.

⁴ *Fanning v. Dunham*, 5 Johns. Ch. R. 142.

⁵ *Peters v. Mortimer*, 4 Edw. Ch. R. 279.

⁶ See *Whitehead v. Peck*, 1 Kelly, 140; *Ballinger v. Edwards*, 4 Ired. Eq. 449; *Rogers v. Rathbun*, 1 Johns. Ch. 367.

credit, and are then sold by him, so that the transaction substantially amounts to a loan of the sum realized by the resale, at a usurious interest. In such a case equity will set the transaction aside, upon repayment of the sum produced by the resale, with lawful interest.¹

223. Still a third class of contracts, which are regarded with disfavor both at law and in equity, on account of the iniquity of their terms, is that which embraces gambling transactions.

A bet at common law was good, unless there was some special ground of invalidity by reason of public policy—as, for example, a wager upon elections.

An act of parliament passed in the reign of George II. prohibited wagering contracts of insurance; and by statute of 8 & 9 Vic., c. 109, § 18, all agreements by way of gaming or wagering are made null and void.²

In the United States the general tendency is to regard all gaming and wagering as opposed to public policy, and therefore void. The subject is regulated by statutes in most of the States.³

The rule, both at law and in equity, in regard to gambling transactions, now seems to be that the courts will not only refuse to lend their aid for the purpose of enforcing such contracts, but they will not assist the losing party in setting the contract aside or recovering back the money paid. The maxim applicable to such cases is *potior est conditio possidentis*:⁴

It had been decided in England that a bond given to secure a sum of money lost at play, might be ordered to be delivered up.⁵ But there is a decision the other way in the United States.⁶

¹ Waller v. Dalt, 1 Ch. Ca. 276; 1 Dick. 8; Barny v. Beak, 2 Ch. Ca. 136; Barker v. Vansommer, 1 Bro. C. C. 149.

² “Provided that this prohibition shall not apply to any subscription or agreement to subscribe towards a plate, prize, or sum of money awarded to the winner of any lawful game, sport, pastime, or exercise.” Horse races, steeple chases, and foot races are considered among the lawful games. See Addison on Contracts, 893.

³ See Wilkinson v. Tousley, 16 Minn. 299.

⁴ Basanquet v. Dashwood, Cas. Temp. Talb. 41; Adams v. Barrett, 5 Georgia, 404; Thomas v. Cronise, 16 Ohio, 54; Cowles v. Raguet, 14 Ohio, 55; Spalding v. Preston, 21 Verm. 9; Götwalt v. Neal, 25 Maryl. 434. See, also, Pope v. Chafee, 14 Rich. Eq. 69; though see Rawden v. Shadwell, Ambler, 268, and Chapin v. Dake, 57 Ill. 295. See 2 Kent Com. 467.

⁵ Rawden v. Shadwell, Ambler, 268.

⁶ Cowles v. Raguet 14 Ohio, 55.

Time contracts, in stocks which are merely, in substance, gaming contracts, cannot be enforced.¹ It is otherwise if they are *bonâ fide* purchases and sales.²

224. Contracts may sometimes be presumed to be fraudulent (or rather incapable of being enforced) from their subject matter; and of transactions of this description illustrations may be found in agreements to waive an equity of redemption, marriage brokage contracts, contracts in restraint of marriage, or of trade, and contracts for procurement of office.

As to the first of these contracts, the nature of an equity of redemption has been already explained in the chapter devoted to mortgages, and the reasons for the policy of the law, prohibiting any stipulations in the mortgage by which the right should be waived, were at the same time attempted to be elucidated.

It will be sufficient to say here that this doctrine should properly receive this passing notice under the head of fraud, as it was introduced for the purpose of preventing impositions upon the weakness and necessities of debtors. Any clause in a mortgage, or any collateral agreement, by which the mortgagee's equity of redemption is in any way clogged, will be considered as a fraud upon his rights, and will be disregarded in a court of equity.³

As to the other cases mentioned above, they all fall under the operation of the general maxim *ex turpi causâ non oritur actio*, which is recognized in equity, sometimes passively by the refusal of the courts to entertain any bill brought to enforce such a contract, and sometimes actively, by entertaining a bill filed for the purpose of having an illegal security, or rather a security given upon an illegal consideration, delivered up and cancelled; or for the purpose of enjoining any action under and by virtue of the illegal contract.

For example, marriage brokage contracts (which is the name usually given to agreements for negotiating marriages), while they were good at the civil law,⁴ have been held illegal at common law,⁵ and are regarded as utterly void in equity.⁶

¹ *Brua's Appeal*, 5 P. F. Sm. 294.

² *Smith v. Bouvier*, 20 P. F. Sm. 325.

³ *Ante*, chap. on Mortgages, p. 158.

⁴ Matchmakers (*prozenetæ*) were allowed to receive a reward for their services.

⁵ *Hall v. Potter*, 3 Lev. 411; 1 Eq.

Cas. Ab. 89; 3 P. Wms. 76; Shower's

Parl. Cas. 76; *Boynton v. Hubbard*, 7

Mass. 112.

⁶ *Cole v. Gibson*, 1 Ves. Sr. 503.

Contracts in restraint of marriage,¹ and contracts for future separation² are equally, although for different reasons, illegal. A covenant not to marry any person except the covenantee is void at law;³ and a bond, with a similar condition, has been ordered to be cancelled in chancery.⁴

225. Gifts in restraint of marriage, that is, gifts bestowed upon condition that they are to be forfeited in the event of marriage in general, or of some particular marriage, are of frequent occurrence, and may properly be noticed in this connection. The authorities upon this subject are not all to be reconciled, and it is difficult to state the law with entire precision. This confusion has arisen from the attempts to import the doctrine of the civil law upon this subject, into the law of England.⁵

The civil law rule was that conditions in restraint of marriage were void.

The origin of the rule, as stated by the Chancellor (Lord Loughborough) in *Stackpole v. Beaumont*,⁶ was that in the Roman Empire the depopulation occasioned by the civil war led to habits of celibacy; and to correct this evil, in the time of Augustus, the Julian law (which went too far and was corrected by the *Lex Papia Poppæa*), not only offered encouragement to marriage, but laid heavy impositions upon celibacy. To impose even partial restraints therefore upon marriage was to act directly contrary to this law, and hence such restraints were necessarily invalid.

No such reasons existed at common law, and, hence, so far as real estate was concerned, the rule of the civil law was not followed, except that conditions in entire restraint of marriage were considered opposed to the policy of the law, and therefore void.⁷ But the succession to personalty having fallen into the hands of the ecclesiastical courts, and these having a great leaning towards the Roman law, the rule as to *that* species of

¹ See notes to *Scott v. Tyler*, 2 Lead. Cas. Eq. 105.

² As to trusts for future separation, see *ante*, p. 125.

³ *Lowe v. Peers*, 4 Burr. 2225.

⁴ *Baker v. White*, 2 Vern. 215.

⁵ See notes to *Scott v. Tyler*, 2 Lead. Cas. Eq. 208 (4th Eng. ed.).

⁶ 3 Ves. 96.

⁷ See *Morley v. Rennoldson*, 2 Hare, 570; notes to *Scott v. Tyler*, 2 Lead. Cas. Eq. 214 (4th Eng. ed.).

property was the same as in the civil law.¹ The tendency, however, of modern decisions is to bring the law in regard to personalty, in this particular, in accord with the doctrines applicable to real estate.

226. In considering this subject it will be convenient to notice, in the first place, conditions in *general* or *entire* restraint of marriage; and secondly, those in *partial* restraint.

A condition annexed to a gift *entirely* restraining the donee from marriage is void as against public policy; and the donee will take the gift free and discharged from the condition. So far as conditions subsequent are concerned, there is no difference as to this rule between realty and personalty.² But in conditions precedent, although the condition be illegal or impossible, an estate in realty, according to the common law, could never vest unless the condition were complied with. Hence, if an estate in land is given when, or as soon as, the donee shall marry a particular person, the estate cannot vest until the marriage takes place. If the subject of the gift, however, is personalty, the condition although precedent being void, the donee will take it absolutely.³

The circumstance that there is a gift over upon non-compliance with the condition, will make no difference in the application of the above rules in regard to *total* restraints.⁴

227. Where the condition is only in partial restraint—as where it is against marrying a particular person, or before arriving at a particular age (provided, the period to which the marriage is postponed be reasonable)—it is valid, and will be enforced if there is a gift over. And this is the rule as respects realty, although there is no gift over. But in regard to personalty the rule is different, and a condition in partial restraint of marriage, if there is no gift over, will be held to be (as it is said) *in terrorem* only, and will not defeat the estate.⁵ It was,

¹ See *Stackpole v. Beaumont*, 3 Ves. 96.

² *Morley v. Rennoldson*, 2 Hare, 570; notes to *Scott v. Tyler* (*sup.*).

³ *Keily v. Monck*, 3 Ridg. P. C. 205; *Maddox v. Maddox*, 11 Grat. 804.

⁴ See *Morley v. Rennoldson*, 2 Hare, 570.

⁵ *Harvey v. Aston*, 1 Atk. 378; *McIlvaine v. Gethen*, 3 Whart. 575; *Hoopes v. Dundas*, 10 Barr, 75; *Hotz's Estate*, 2 Wright, 422; *Cornell v. Lovett*, 11 Casey, 100; *Maddox v. Maddox*, 11 Grat. 804; *Waters v. Tazewell*, 9 Maryl. 291. Hill on Trustees, 496 (775, 4th Am. ed.).

however, held by Sir Wm. Page Wood, then vice-chancellor, in *Newton v. Marsden*, that a condition in restraint of marriage attached to a legacy to the widow of the testator's nephew, was valid.¹

If the condition in partial restraint is precedent, it will be enforced, even if there is no limitation over.²

Restraints upon marriage may sometimes be enforced by way of limitation, when they would be ineffectual if put in the shape of conditions. A testator may make the period of enjoyment of his bounty as short as he pleases, and may fix the occurrence or non-occurrence of any event, no matter how absurd or arbitrary the limitation may be, as the boundary, at which the estate is to cease. In such a case the particular estate will come to an end by virtue of its own limitation, and the estate in remainder will, of course, vest in possession.

If then an estate be given to A. until she marries, and from and after her marriage to B., the marriage of A. would not operate to defeat an estate already vested, but would simply mark the period at which a vested estate of uncertain duration is to determine.³ In such a case the law of *conditions* has no place. Hence it is settled that a gift *durante viduitate* with a limitation over, is valid; and that upon marriage of the widow, the party in remainder will take.⁴

The real principle of cases of this kind is, that the condition is not regarded as an arbitrary prohibition of marriage altogether, but the conditional gift is considered as made to the widow, because she is a widow, and because the circumstances would be entirely changed if she entered into a new relation.⁵

228. Still another class of contracts, which are illegal by reason of their *nature*, are contracts in general restraint of trade.

The rule upon this subject is that a contract in general restraint

¹ 2 Johns. & H. 356. See, also, *Commonwealth v. Stauffer*, 10 Barr, 350; *McCullough's Appeal*, 2 Jones, 197; *Phillips v. Medbury*, 7 Conn. 568.

² *Stackpole v. Beaumont*, 3 Ves. 89; *Hill on Trustees*, 496.

³ See *Fearne on Cont. Rem.* 10.

⁴ See *Vance v. Campbell's Heirs*, 1

Dana, 229; *Pringle v. Dunkley*, 14 Sm. & Marsh. 15; *Hughes v. Boyd*, 2 Sneed, 512; notes to *Scott v. Tyler*, 2 Lead. Cas. Eq. 412 (Am. ed.), where this rule is somewhat criticized by the learned American editor.

⁵ Per Wood, V. C., in *Newton v. Marsden*, 2 Johns. & H. 367.

of trade is void ; but if in partial restraint of trade only, it may be supported, provided the restraint be reasonable, and the contract be founded on consideration.¹ The doctrine is a very old one, a case being found in the year books,² in which Mr. Justice Hall lost his temper at the very sight of the bond, and exclaimed, with an oath, that if the plaintiff had been in court, he should have gone to prison until he had paid a fine.

The leading authority upon the subject is *Mitchell v. Reynolds*³—from which, and from subsequent authorities in England and in this country, it may be gathered that a restraint upon trade in order to be good at law must be, in the first place, *partial* ; in the second place, *reasonable*, that is, such a restraint only as may be necessary to protect the business of the party for whose benefit the contract is made ; and thirdly, founded on a *valuable* consideration, although as to this last point it is now settled that the courts will not enter into the question of *adequacy* of consideration, unless perhaps the inadequacy is such as to stamp the agreement as an unreasonable one.⁴

A contract in restraint of trade which is, for any of the reasons stated above, obnoxious in the eye of the law, cannot (upon the general principles already referred to) be enforced in equity ; and an instrument given to secure such an agreement may be decreed to be delivered up and cancelled.

Equity, moreover, is loth to enforce a contract in restraint of trade, even although it be good at law, if the terms are hard or even complex.⁵

Contracts in restraint of trade, however, if they are partial, reasonable, and founded on a valuable consideration, and not for any special reason unjust or inequitable, will be enforced in equity.⁶

Combinations entered into for the purpose of preventing the parties thereto, or others, from engaging in trade, are illegal.⁷

¹ Smith on Contracts, 135, Sharswood's note.

² Henry VI.

³ 1 P. Wms. 181.

⁴ See notes to *Mitchell v. Reynolds*, 1 Sm. Lead. Cas. 705.

⁵ *Kimberly v. Jennings*, 6 Sim. 340 ; *Kemble v. Kean*, 6 Sim. 335 ; *Whittaker*

v. Howe, 3 Beav. 383 ; *Kerr on Injunctions*, 506, 514 ; *post*, Part III., Chap. II.

⁶ *Morris v. Colman*, 18 Ves. 437. See *Cruttwell v. Lye*, 17 Ves. 335.

⁷ *Story's Eq.*, § 292 ; *Stanton v. Allen*, 5 Denio, 434 ; *Hilton v. Eckersley*, 32 Eng. L. and Eq. R. 198 ; 34 *Id.* 224.

Upon the same general principle, bonds restraining the right of alienation have been ordered to be delivered up, as opposed to public policy.¹

229. The last of the contracts which will be noticed as being void on the ground of illegality in their subject matter, are contracts for the procurement of sale of public offices. Sir John Strange, M. R., in his opinion in *Chesterfield v. Janssen*,² says: "So in bargains to procure offices, neither of the parties is defrauded or unapprised of the terms, but it seems to introduce unworthy objects into public offices; and, therefore, for the sake of the public the bargain is rescinded."

The conduct of equity in such a case is but in accordance with a general principle by which courts of chancery, and, indeed, every other tribunal, would discourage, in every way, contracts opposed to good morals and sound public policy. The examples of illegal contracts already given, are but instances of this general principle; and it might not be too much to say that in every case where rules of public policy are violated, and where relief could be afforded by the machinery of a court of chancery, and where a full, adequate, and complete remedy could not be had at common law, equity will interpose for the purpose of restraining an action brought to enforce such a contract, or to compel the surrender of the instrument by which it had been secured.

SECTION III.

FRAUD PRESUMED FROM THE RELATIONS OF THE PARTIES.

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| 230. Mental disability; drunkenness;
<i>duress</i> . | 234. Guardian and ward. |
| 231. Undue influence; gifts; <i>Huguenin v. Baseley</i> . | 235. Parent and child. |
| 232. Contracts; <i>Tate v. Williamson</i> . | 236. Solicitor and client. |
| 233. Parties between whom confidential
relation ordinarily exists. | 237. Trustee and <i>cestui qui trust</i> . |
| | 238. Fiduciary can make no profit; <i>Bank v. Tyrrell</i> . |
| | 239. Promoters of companies. |

230. The third species of fraud, according to Lord Hardwicke's classification, is that which is presumed from the circumstances

¹ *Jervis v. Bruton*, 2 Vern. 251; *Freeman v. Freeman*, 2 Vern. 223; *Poole's Case*, Moore, 810.

² 1 Atk. 301. See, also, *Boynton v. Hubbard*, 7 Mass. 119.

and condition of the parties contracting ; and this may, perhaps, be again subdivided into two classes, viz., first, where one of the parties is laboring under some mental disability ; and, secondly, where the transaction takes place under undue influence.

As to the first of the two classes, mere weakness of mind is not of itself a sufficient ground for equitable interference. It would be impossible to carry on the business of the courts, if they undertook to interfere in every case in which a superior and more astute intellect obtained an advantage in a bargain over a dull or feeble mind.¹ But an entire absence of intellectual power, or great mental aberration will be sufficient to cause a contract to be rescinded.² Hence the contracts of idiots and lunatics are void, or, at least, voidable.³ And while mere weakness of mind will not be enough, of itself, to justify a rescission, it will nevertheless always constitute an important element in actual fraud.⁴ If, therefore, a transaction be in the slightest degree tainted with deceit, the intellectual imbecility of the injured party will be laid hold of by a chancellor to make out a case of actual fraud, which might otherwise be incapable of proof.⁵ Whatever be the cause of the mental weakness—whether it arise from permanent injury to the mind, or temporary illness, or excessive old age—it will be enough to make the court scrutinize the contract with a jealous eye ; and any unfair-

¹ *Osmond v. Fitzroy*, 3 P. Wms. 129 ; *Ex parte Allen*, 15 Mass. 58 ; *Hadley v. Latimer*, 3 Yerg. 537 ; *Rogers v. Higgins*, 57 Ill. 247 ; *Killian v. Badgett*, 27 Ark. 166 ; *Mann v. Betterly*, 21 Verm. 326 ; *Thomas v. Sheppard*, 2 McCord Eq. 36 ; *Rippy v. Gant*, 4 Ired. Eq. 443 ; *Nace v. Boyer*, 6 Casey, 99 ; *Hyer v. Little*, 5 C. E. Green, 443 ; *Lozear v. Shields*, 8 *Id.* 509 ; *Stiner v. Stiner*, 58 Barb. 643.

² *Allis v. Billings*, 6 Met. 415 ; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 239 ; *De-silver's Est.*, 5 Rawle, 111 ; *Bensell v. Chancellor*, 5 Whart. 376 ; *Beals v. See*, 10 Barr, 56.

³ See *Hill on Trustees*, 46 (73, 4th Am. ed.). See, also, *Howe v. Howe*, 99 Mass. 88.

⁴ *Nottidge v. Prince*, 2 Giff. 246 ; *Baker v. Monk*, 33 Beav. 419 ; *Boyse v. Rossborough*, 6 H. L. Cas. 2 ; *Harding v. Handy*, 11 Wheat. 103 ; *Tracey v. Sacket*, 1 Ohio St. 54 ; *Whitehorn v. Hines*, 1 Munf. 557 ; *Whelan v. Whelan*, 3 Cow. 537 ; *Deatly v. Murphy*, 3 A. K. Marsh. 472 ; *Brogden v. Walker*, 2 H. & J. 285 ; *Rumph v. Abercrombie*, 12 Ala. 64.

⁵ *Malin v. Malin*, 2 Johns. Ch. 238 ; *Hutchinson v. Tindall*, 2 Green Ch. 357 ; *Rumph v. Abercrombie*, 12 Alab. 64 ; *Hunt v. Moore*, 2 Barr, 105 ; *Brady's Appeal*, 16 P. F. Sm. 277 ; *Huguenin v. Baseley*, 14 Ves. 273 ; *Harding v. Handy*, 11 Wheat. 103 ; *Hill on Trustees*, 154.

ness or overreaching will be promptly redressed.¹ A mere latent suspicion of unfairness, however, will not be enough.²

On the other hand, it need scarcely be remarked that the mere circumstance of old age, or physical feebleness, will not render a transaction fraudulent, if, in point of fact, the party is intelligent and capable.³

Drunkenness falls under the same principles.⁴ If a man is so far drunk that he is substantially *non compos mentis*, his contract will be invalid; but if there is intoxication, not so great in extent, equity will not interfere.⁵ It will, however, in cases of partial drunkenness, lay hold of any circumstances tending to show actual imposition, and thus make out a case of actual fraud, especially if the drunkenness has been brought about by the contrivance of the other party to the transaction.⁶

Equity will also relieve against contracts obtained under duress, fear, apprehension, or extreme distress.⁷ Thus in *Williams v. Bayley*, it was held that a father, whose name had been forged by his son, and who had been appealed to, to take the amount of the liability upon himself, knowing that unless he did so his son would be exposed to a criminal prosecution with the certainty of conviction, could not be regarded as a free and voluntary agent, so as to render a security given under such a pressure valid.⁸

But a bill will not lie for rescission on the ground of duress *after* the contract.⁹

231. Passing now to the second class of cases, those, namely, in

¹ *Hill on Trustees*, 155; *Perry on Trusts*, §§ 190, 191; *Matthews v. Baxter*, 28 L. T. N. S. 169.

² *Hetrick's Appeal*, 8 P. F. Sm. 477.

³ *Gratz v. Cohen*, 11 How. 19. See, also, *Lewis v. Pead*, 1 Ves., Jr. 19; *Pratt v. Barker*, 1 Sim. 1; 4 Russ. 507; *Graham v. Pancoast*, 6 Casey, 89.

⁴ See *Co. Litt.* 447, a.

⁵ *Gore v. Gibson*, 13 M. & W. 623; *Clifton v. Davis*, 1 Pars. Eq. 31; *Johnson v. Meddlicot*, 3 P. Wms. 131, n.; *Cory v. Cory*, 1 Ves., Sr. 19; *Maxwell v. Pittinger*, 2 Green Ch. 156; *Selah v.*

Selah, 8 C. E. Green, 185; *Morrison v. McLeod*, 2 Dev. & Bat. Eq. 221; *Harbison v. Lemon*, 3 Blackf. 51.

⁶ *Crane v. Conklin*, Saxt. 346; *Cory v. Cory*, 1 Ves., Sr. 19; *Calloway v. Witherpoon*, 5 Ired. Eq. 128; *Phillips v. Moore*, 11 Missouri, 600; *Shaw v. Thackray*, 1 Sm. & Giff. 537.

⁷ *Hill on Trustees*, 156.

⁸ *Williams v. Bayley*, L. R. 1 H. L. Cas. 218. See *French v. Shoemaker*, 14 Wal. 233.

⁹ *Fulton v. Loftis*, 63 N. C. 393.

which the fraud springs from the circumstances and condition of the parties to the transaction, it may be stated, as a general rule, that relief will be afforded, in equity, in all transactions in which "influence has been acquired and abused, in which confidence has been reposed and betrayed."¹

The transaction which takes place under undue influence may be either in the nature of a gift, or of a contract. In either aspect it is regarded by courts of equity with a jealous eye, but the scrutiny in cases of gifts is more severe and searching than in those of contracts.

The leading authority upon the subject of gifts which are obtained through undue influence, is *Huguenin v. Baseley*,² where a widow lady executed a voluntary settlement upon a clergyman who had ingratiated himself with her, and had induced her to withdraw her affairs from the hands of her solicitor by whom they had been previously managed; and the settlement was set aside, on the ground of the confidential relations of the parties. "The question," said Lord Eldon, "is not whether she knew what she was doing, had done, or proposed to do, but *how the intention was produced*; whether all care and providence was placed around her, as against those who advised her, which from their situation and relation in respect to her they were bound to exert on her behalf."

So in a modern case the court said that, had it not been for the length of time during which the transaction had been acquiesced in and by which alone the complainant was barred, a gift from a daughter, soon after attaining twenty-one, to her father would have been set aside solely on the ground of the jealousy with which, upon principles of natural justice and upon considerations important to the interests of society, the law examines, scrutinizes, and weighs in golden scales every such transaction.³ If

¹ *Smith v. Kay*, 7 H. L. Cas. 750. This language of Lord Kingsdowne is even more striking than that used by Sir Samuel Romilly in his celebrated reply in *Huguenin v. Baseley*, viz., that "the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another."

² 14 Ves. 273; 2 Lead. Cas. Eq. 556 (4th Eng. ed.). See *Kirwan v. Cullen*, 4 Ir. Ch. R. 330, and *Falk v. Turner*, 101 Mass. 494, for cases which were held *not* to fall under the doctrine of *Huguenin v. Baseley*.

³ *Wright v. Vanderplank*, 8 De G. M. & G. 137. See, also, *Turner v. Collins*, L. R. 7 Ch. App. 329; *Hoghton v. Hoghton*,

the person who stands in the confidential relation wishes to hold the benefit conferred, he must show that the person conferring it had competent and independent advice.¹

The same considerations, however, are not universally applicable to *testamentary* dispositions. Thus a client may make a gift to a solicitor by will, even though the will is drawn by the solicitor, provided the will was not made under any mistake or misapprehension caused by the solicitor.²

Even gifts between persons who stand in no confidential relation to each other are watched with jealousy.³

232. Passing now from the subject of gifts, to that of contracts, it may be stated, as a general rule, that a contract between parties who stand in a confidential relation to each other falls under the principle laid down by Lord Kingsdowne in *Smith v. Kay*.⁴ Wherever two persons stand in such a relation that while it continues confidence is necessarily reposed by one, and the influence which necessarily grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.⁵ There can be no contract between the two, except after the fullest and fairest explanation and communication of every particular resting in the breast of the one, who seeks to

15 Beav. 278; *Prideaux v. Lonsdale*, 1 De G. J. & Sm. 433; *Everitt v. Everitt*, L. R. 10 Eq. 405; *Tomson v. Judge*, 3 Drew. 306; *Broun v. Kennedy*, 33 Beav. 133; 4 De G. J. & Sm. 217; *Savery v. King*, 5 H. L. Cas. 626; *Lyon v. Home*, L. R. 6 Eq. 655 (where a transfer of £24,000 by an old lady of seventy-five to a spiritualist was set aside); *Fulham v. McCarthy*, 1 H. L. Cas. 703; *Greenfield's Estate*, 2 Harris (Pa.), 507; *Taylor v. Taylor*, 8 How. 183; *Slocum v. Marshall*, 2 Wash. C. C. 397; *Todd v. Grove*, 33 Maryl. 188; *Turner v. Turner*, 44 Mis. 535. But in *Jenkins v. Pye*, 12 Peters, 253, Mr. Justice Thompson declined to accede to the

proposition that a conveyance from a child to a parent was *prima facie* void.

¹ *Rhodes v. Bate*, L. R. 1 Ch. App. 252.

² *Hindson v. Weatherill*, 5 De G. M. & G. 301. Agreements between solicitor and client are now regulated in England by Stat. 33 and 34 Vic., c. 28 (Attorneys' and Solicitors' Act of 1870); 2 Lead. Cas. Eq. 390.

³ 2 Lead. Cas. Eq. 582. See *Cooke v. Lamotte*, 15 Beav. 234

⁴ 7 H. L. Cas. 750; *ante*, p. 229.

⁵ *Tate v. Williamson*, L. R. 2 Ch. App. 61, per Lord Chelmsford.

establish the contract, with the person so trusting him.¹ This doctrine was applied by Lord Chancellor Chelmsford in *Tate v. Williamson*, a case which well illustrates the extent and nature of the general principle. There Tate, a young man of twenty-three, who was the owner of a moiety of a freehold estate, and who was largely indebted, wrote to his great uncle for advice and assistance in regard to the payment of his debts. His great uncle sent a nephew, Williamson, to see Tate upon the subject, and Williamson made an offer to purchase Tate's moiety of the estate for £7000, which was verbally accepted. Before any agreement was signed, Williamson obtained a valuation by a surveyor estimating the value of the mines under the whole tract at £20,000. The sale was completed without this information having been communicated to Tate. A bill was subsequently filed by Tate to set the sale aside, and a decree in his favor was made by Vice Chancellor Wood,² which was affirmed by Lord Chelmsford.³ It will be observed that in this case there was no well-defined confidential relation (such as that of attorney and client, guardian and ward, and so forth) existing between the parties; but that the circumstances of the transaction were such that one man necessarily was trusted by the other, and when that confidence arose, no matter how, the duty of full disclosure immediately arose with it. It shows the truth of the remark made by Lord Cranworth in *Smith v. Kay*,⁴ that the familiar cases of the influence of a parent over his child, of a guardian over his ward, of an attorney over his client, are but instances of a broad and widely applicable principle.⁵

233. Starting, therefore, with the general principle that all transactions, whether of gift or contract, made under undue

¹ Note to *Fox v. Mackreth*, 1 Lead. Cas. Eq. 171 (4th Eng. ed.). See, also, *Norris v. Tayloe*, 49 Ill. 17.

² Afterwards Lord Chancellor Hatherley. The case, when before the Vice-Chancellor's court, is reported in L. R. 1 Eq. 528.

³ L. R. 2 Ch. App. 55. See, also, *Grosvenor v. Sherratt*, 28 Beav. 659; *Cary v. Cary*, 2 Sch. & Lef. 173; *Gibson v. Jeyes*, 6 Ves. 266; *Gresley v. Mousley*, 3 De G. F. & J. 433.

⁴ 7 H. L. Cas. 771.

⁵ See, also, *Turner v. Turner*, 44 Mis. 535; *Harkness v. Fraser*, 12 Florida, 341; *Rockafellow v. Newcomb*, 57 Ill. 186; *McCormick v. Mallin*, 5 Blackf. 507. In this last case it was said with succinctness and accuracy that the rule under consideration applies "to all cases where confidence on the one hand, and influence on the other, exist, from whatever causes they may spring;" citing *Griffiths v. Robins*, 3 Mad. 191; *Revett v. Harvey*, 1 Sim. & S. 502.

influence growing out of the relations of the parties, may, if they are injurious to the confiding party, be set aside solely on the ground of the confidential relation, and without more ; let us see how this principle has been applied to the numerous cases in which such confidential relations ordinarily arise.

There are many such relations. In some of them the contract is absolutely voidable at the option of the party who is presumed to be imposed upon ; while in others, the confidential relation is *primâ facie* evidence of fraud, which may, however, be rebutted by showing that the transaction is a fair and honest one, and that no improper advantage has been taken of the influence arising out of the confidential relation.

The question always is, to what extent may undue influence be presumed from the relation of the parties.

234. This presumption of undue influence is more or less strong according to the peculiar relations which the parties occupy towards each other.

The relation of guardian and ward is one in which the presumption exists, perhaps, in the highest degree ; and a transaction between persons thus situated during the continuance of the relationship, and, especially, if it takes the form of a gift, can never stand.¹

The same rule applies, though not with the same stringency, to contracts between guardian and ward, and to gifts from the latter to the former, immediately after the ward has attained his majority ; the reason being that the influence acquired during the continuance of the relation is still supposed to exist ; and all settlements or dispositions of property are presumed to be made under undue influence.² If such transactions, therefore, are ever sustained, they are only so when the utmost good faith is displayed by the guardian, and when the ward is put fully in possession of all the information in regard to the property, which is necessary in order that he may make an advantageous and intelligent disposition of it. Hence, although a gift from a ward to his guardian *may* be sustained if it is shown to have

¹ Dawson v. Massey, 1 B. & B. 226 ; Blackmore v. Sheby, 8 Humph. 439 ; Bostwick v. Atkins, 3 Comst. 53 ; Galtton v. Cunningham, 8 Cow. 361. ² Eberts v. Eberts, 5 P. F. Sm. 119 ; Wills's App., 10 Harris (Pa.), 332 ; Womack v. Austin, 1 S. Carolina (N. S.), 421.

been made upon a fair, serious, and well-informed consideration, it will not, as a general rule, be suffered to stand, although there may not be any evidence of actual unfairness.¹ In other words, the presumption is against the bargain or the bounty; and the *onus* of showing its entire fairness is thrown upon the guardian. It *may* be valid; but inherently, and of itself, it is presumptively fraudulent.

On the same principles a covenant by a man about to marry, to release his intended wife's mother from all account of mesne profits, was set aside.²

235. Transactions between parent and child, while not viewed with the same degree of suspicion as those between guardian and ward, are, nevertheless, always closely investigated in equity, and will be set aside if there is the slightest evidence of imposition or unfairness. The mere existence of the relation of parent and child (it has been said) is not, perhaps, enough to vitiate an act which, as between strangers, would have been valid;³ but the modern English authorities seem to favor a stricter rule.⁴ Of course, if there is any evidence of pressure or influence *unduly* exercised, the transaction can never stand.

A leading case on this subject is *Taylor v. Taylor*, where the improper manner in which parental influence may be exercised is strikingly exemplified.⁵

Dispositions of property, however, which amount to reasonable and convenient family arrangements, will be upheld as between parent and child.⁶

236. The rule in regard to solicitor and client is more stringent than in either of the two cases already considered.⁷ A

¹ See *Hylton v. Hylton*, 2 Ves. Sr. 547; *Hatch v. Hatch*, 9 Ves. 292; *Richardson v. Linney*, 7 B. Mon. 571; *Andrews v. Jones*, 10 Alab. 400; *Garvin v. Williams*, 50 Mis. 206.

² *Hamilton (Duke of) v. Lord Mohun*, 1 P. Wms. 118.

³ *Jenkins v. Pye*, 12 Pet. 241. The rule, however, is more strictly stated in *Archer v. Hudson*, 7 Beav. 551, by Lord Langdale, M. R. (the transaction, however, was not in that case one between parent and child); and see *ante*, p. 229, note 3.

⁴ *Ante*, p. 229. See, also, *Baker v. Bradley*, 7 De G. M. & G. 597; *Wright v. Vanderplank*, 8 De G. M. & G. 137; *Hoghton v. Hoghton*, 15 Beav. 278.

⁵ *Taylor v. Taylor*, 8 How. 183.

⁶ *Jenner v. Jenner*, 2 Giff. 232; 2 De G. F. & J. 359; *Hartopp v. Hartopp*, 21 Beav. 259. See *Williams v. Williams*, L. R. 2 Ch. App. 294, an arrangement between brothers.

⁷ See *Tyrrell v. The Bank of London*, 10 H. L. Cas. 26.

solicitor *may* purchase from his client, although the bargain will be subjected to the most rigid scrutiny, and the *onus* of showing its fairness lies on the former; but a gift from client to counsel is absolutely void.¹

Indeed, even in cases of contract, where the property is the subject matter of the litigation in which the attorney is acting, it is with great difficulty that the purchase can, under any circumstances, be sustained. The utmost good faith (*uberrima fides*) is required on the part of the legal adviser; and the general rule of public policy, which discountenances transactions between persons who are situated in a confidential relation towards each other, applies with particular force to the case of attorneys at law who are officers of the court, and are, on that ground as well as on account of the powerful influence which they exercise over the minds of their clients, restrained from dealing with those whose interests they have in charge.

The question is not whether there was any actual imposition in the particular case. Lord Loughborough, in *Newman v. Payne*, when speaking of Lord Hardwicke's decision on this point, in *Walmsley v. Booth*,² says that "it was the case of Japhet Crook, who was *more likely to impose than be imposed on*, yet he *might* be imposed on;" and this is the ground upon which courts of equity have always gone, viz., the fear lest the client "*might* be imposed on."³

This rule as to attorneys will apply as long as the relation continues, and even after it has ceased, if the transaction takes place under the still subsisting influence of that relation.⁴

It will not, however, apply when the relation has ceased, and the influence growing out of the same has terminated;⁵ and when the attorney has assumed the hostile attitude of a pressing creditor, he may deal with his client as with a stranger.⁶

A client *may* make a gift to his counsel in his will.⁷

¹ *Holman v. Loynes*, 4 De G. M. & G. 270; *Greenfield's Est.*, 2 Harris (Penna.), 489, 506. *Mott v. Harrington*, 12 Verm. 199; *Miles v. Ervin*, 1 McCord Ch. 524; *Smith v. Brotherline*, 12 P. F. Sm. 461.

² 2 Atk. 25.

³ *Newman v. Payne*, 2 Ves. Jr. 200. See, also, *King v. Savery*, 5 H. L. Cas. 626; *Merritt v. Lambert*, 10 Paige, 352;

⁴ *Henry v. Raiman*, 1 Casey, 354.

⁵ *Wood v. Downes*, 18 Ves. 127.

⁶ *Johnson v. Fesemeyer*, 3 De G. & J. 13.

⁷ *Hindson v. Weatherill*, *ante*, p. 230.

237. The relation of trustee and *cestui qui trust* is also one of peculiar confidence. The trustee necessarily has ample opportunities for a thorough knowledge of the value, both present and prospective, of the trust estate, of which the *cestui qui trust*, not having the management of affairs in his hands, must, to a great extent, be ignorant; while at the same time the influence which the former exercises over the mind of the latter is generally very considerable. The general rule, therefore, is, that the trustee cannot take beneficially by purchase or gift from the *cestui qui trust*. The transaction is ordinarily voidable at the option of the latter.¹

But the gift or purchase may be deprived of its aspect of presumptive fraud, by the absence of those elements by which fraud is made up. These are, as has just been stated, knowledge on the part of the trustee, ignorance on the part of the *cestui qui trust*, and influence unduly used by the former over the mind of the latter. If, therefore, the information which the trustee has is in no way superior to that of the *cestui qui trust*; if the latter is fully informed of all the facts of the case, and their probable bearings upon the value of the property; and if he is acting upon independent advice, and his mind is entirely free from any control of the trustee, and the transaction be in itself a reasonable one, it may, under these circumstances, be upheld.² The rule under consideration grows out of the general principle explained in a former chapter, that a trustee can make no profit out of the trust estate.³

The rule does not apply to the case of a mere dry trustee. The position of such a trustee gives him no vantage ground, either of superior information or of undue influence, over the *cestui qui trust*, and the parties, therefore, deal as strangers, and are subject to the ordinary rules of buyer and seller.⁴

The same rule as that which exists between trustee and *cestui qui trust*, applies to all persons who occupy a fiduciary, or *quasi* fiduciary relation—such as executors or administrators, direc-

¹ *Coles v. Trecothick*, 9 Ves. 234; ² See *Perry on Trusts*, § 195; *Hill on Smith v. Townshend*, 27 Maryl. 368; *Trustees*, 158.

Clarke v. Deveaux, 1 S. Carolina (N. S.), 184; notes to *Fox v. Mackreth*, 1 Lead. ³ See *ante*, page 147.

⁴ *Parkes v. White*, 11 Ves. 226. Cas. Eq. 92; *Perry on Trusts*, § 195.

tors of a corporation or a society,¹ agents, medical or religious advisers²—in fine to all those who occupy positions of trust and confidence towards others.³

238. Equity not only views gifts and contracts which are made or take place between parties occupying a confidential relation, with a jealous eye, but it goes further, and forbids any person standing in a fiduciary position, from making any profit, in any way, at the expense of the party whose interests he is bound to protect, without the fullest and most complete disclosure. This proposition leads us to an interesting class of cases of which the leading one may be said to be *Tyrrell v. The Bank of London*, in the House of Lords.⁴ In that case there was in existence a project to start a new bank in London, and among the projectors of the scheme was the appellant, a member of the bar, whose firm, it had been agreed, were to be employed as the solicitors of the company. The appellant, hearing that a certain lot of ground was for sale, suitable for the purposes of the bank, entered into an arrangement with a party who controlled the option to buy from the owners, whereby the appellant became interested in the option. He then induced his co-projectors to purchase a portion of the property at an advance, he (of course) making a certain profit by the transaction. After the arrangement was discovered, a bill was filed by the company for the purpose of obtaining relief; and it was held that the appellant was accountable to the company for the profit which he had made. This case is instructive as showing the exact measure of relief which a court of equity affords in such cases, and the grounds upon which that relief rests. The company (it was held) had not a mere right to rescind the bargain into which they had entered; nor, on the other hand, was the appellant held to be a trustee of any property other than that which he had actually bought and conveyed to the company. The decision, therefore,

¹ But while there is, in one sense, a trust relation between stockholders and directors of a corporation, yet the sale of stock by a stockholder to a director is not so far connected with the subject of the trust or trust relation as to bring it under the rule applicable to dealings

between parties in confidential relations. *Carpenter v. Danforth*, 52 Barb. 581.

² *Ahearne v. Hogan*, 1 Drury, 310; *Greenfield's Est.*, 12 Harris, 232; *Huguenin v. Baseley*, 14 Ves. 273.

³ See Hill on Trustees, 247 (4th Am. ed.); *Ford v. Olden*, L. R., 3 Eq. 461.

⁴ 10 H. L. Cas. 26.

was that the company were not obliged to repudiate the transaction altogether, but were entitled to take the lot, which had been conveyed to them, at the price which it had cost Tyrrell; in other words, that as to that particular property Tyrrell could make no gain at the company's expense. But it was further held that the appellant's liability to account stopped with that particular lot, and did not extend to other property which had been included in the purchase from the original owner.¹

239. This rule is thoroughly established both in England and in the United States.² The difficulty is in its application; for it is equally well established that there is no principle of equity which prohibits a man from buying a piece of property, and afterwards saying to those who subsequently unite with him in getting up a company: "I begin the transaction here—I have purchased land, no matter how, or from whom, or at what price—I will sell the land at so much."³ The test seems to be, whether at the time of the acquisition of the property by the defendant, he was then acting as a projector or promotor of the company. If he was, he can make no profit at the company's expense by a purchase and resale.

It was remarked in a former part of this treatise, that trustees could not, without leave of the court, buy at their own sales.⁴ The same remark is applicable to all parties whose duty requires them to sell for the benefit of another. They cannot sell to themselves. It is repugnant to common honesty and justice that the same party should be both vendor and purchaser. If he attempts so to act, it is a fraud.⁵

¹ See the argument of Sir Roundell Palmer, afterwards Lord Chancellor Selborne, and the manner in which that argument was answered by the court, 10 H. L. Cas., pp. 31, 45.

² See *Hitchens v. Congreve*, 4 Russ. 574; *Beck v. Kantorowicz*, 3 K. & J. 230; *Simons v. The Vulcan Oil Co.*, 11 P. F. Sm. 202; *McElhenny's Appeal*, *Id.* 192 (opinion of Sharswood, J.); *Bailey v. Coal Co.*, 19 P. F. Sm. 340; *Great Luxembourg Railway Co. v. Magnay*, 25 Beav. 586; *Collins v. Case*, 23 Wis. 230; *Lindley on Partnership*, 481.

³ See *Foss v. Harbottle*, 2 Hare, 489;

Densmore v. Densmore, 14 P. F. Sm. 49; *McElhenney v. Hubert Oil Co.*, 11 P. F. Sm. 188.

⁴ *Ante*, p. 106, 107, 148. See, also, *Frank's Appeal*, 9 P. F. Sm. 195; *Campbell v. McLain*, 1 *Id.* 200; *Ogden v. Larrabee*, 57 Ill. 389; *Colgate v. Colgate*, 8 C. E. Green, 372.

⁵ See *Norris v. Tayloe*, 49 Ill. 18; *Greenwood v. Spring*, 54 Barb. 375; *North Baltimore Building Association v. Caldwell*, 25 Maryl. 423; *Carter v. Thompson*, 41 Alab. 375; *Harris v. Parker*, *Id.* 604.

SECTION IV.

FRAUD AFFECTING THIRD PARTIES; GENERAL RULES AS TO FRAUD.

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| <p>240. Subdivisions of frauds of this class ; fraud upon creditors.</p> <p>241. Statute 13 Elizabeth, c. 5.</p> <p>242. Jurisdiction of equity in cases under the statute.</p> <p>243. Conveyance must be for a good consideration, and <i>bonâ fide</i>.</p> <p>244. Moral obligations ; consideration of marriage.</p> <p>245. Voluntary transfers ; conveyances by persons indebted.</p> <p>246. Conveyances of property which could not be reached by execution.</p> <p>247. Gifts from husband to wife.</p> <p>248. Parties by whom fraudulent conveyances may be avoided.</p> <p>249. Secret agreements touching composition deeds.</p> <p>250. Fraud upon subsequent purchasers ; Statute 27 Eliz., c. 4.</p> <p>251. Difference between the English and American rules.</p> | <p>252. Statute not applicable to personal chattels.</p> <p>253. Fraud on marital rights ; <i>Strathmore v. Bowes</i>.</p> <p>254. Ignorance of the husband as to the existence of property immaterial.</p> <p>255. Circumstances which constitute fraud on marital rights.</p> <p>256. Fraud on powers ; <i>Aleyn v. Belchier</i>.</p> <p>257. Appointment must be made solely to carry out the purpose of the power ; <i>Topham v. The Duke of Portland</i>.</p> <p>258. Admissibility of parol evidence to vary or contradict written instruments in cases of fraud ; <i>Woollam v. Hearn</i> ; <i>Gillespie v. Moon</i>.</p> <p>259. How the right to impeach a fraudulent transaction may be lost ; confirmation ; release ; acquiescence.</p> <p>260. Delay ; <i>bonâ fide</i> purchasers for value.</p> |
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240. The last class of frauds embraces those which do not operate to deceive either of the immediate parties to the transaction, but which affect injuriously the interests of third persons.

Frauds of this class may be divided, as respects the injured parties, into (1). Frauds upon creditors ; (2). Frauds upon purchasers ; (3). Frauds upon marital rights ; and (4). Frauds upon powers. The first of these subdivisions of fraud arises in this way :—

An almost universal incident to property when possessed absolutely by persons *sui juris*, is the power of alienation. Subject to some few restrictions—such as those imposed (in England) by the statutes of mortmain, and the like—a man may sell, exchange, or give away his lands and goods when and to whom he pleases.

If, however, a man is in the position of a debtor, this absolute right of alienation is qualified and restrained by the principle that the power of disposition is not to be exercised for the purpose of defrauding his creditors, or defeating their lawful right to subject the estate of the debtor to the satisfaction of their claims. Hence almost all systems of jurisprudence discountenance alienations which are fraudulent as to creditors, and provide means whereby this species of wrong may be redressed.

241. Conveyances in fraud of creditors were, it seems, voidable at common law.¹ However, whether it was that this was originally considered a doubtful question, or whether the frequency and variety of these fraudulent alienations were so great, that it was deemed proper to affirm the common law by positive legislation; certain it is, that from very early times, statutes were passed for the purpose of protecting the rights of creditors against such covinous practices.

The most celebrated of these statutes is that of 13 Eliz., c. 5.²

This statute, after reciting that "feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been contrived of malice, fraud, covin, collusion, etc., to delay, hinder, or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, etc.," proceeds to enact that every feoffment, etc. of lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution, made for any intent and purpose before declared and expressed, shall be, as against that person, his heirs, successors, executors, etc., whose actions, suits, etc. are or might be in any wise disturbed, hindered, delayed, or defrauded, utterly void.³

242. Equity has concurrent jurisdiction with law over frauds under these statutes; and the same rules of construction are adopted in both courts.⁴ Where property, which is legally

¹ See notes to *Twyne's Case*, 1 Sm. Lead. Cas. 33; *Cadogan v. Kennett*, 2 Cowp. 432; *Clements v. Moore*, 6 Wall. 812; *Clark v. Douglass*, 12 P. F. Sm. 408.

² The statute of 27 Eliz., c. 4, was (as is well known) passed to protect the rights of subsequent purchasers. See *post*, p. 245.

³ This statute has been substantially re-enacted and its provisions adopted in most of the United States; 2 Kent's Com. 440.

⁴ Note to *Sexton v. Wheaton*, 1 Am. Lead. Cas. 58, 59; *Hopkirk v. Randolph*, 2 Brock. 133.

liable to be taken in execution has been fraudulently conveyed or encumbered, the jurisdiction is concurrent, as the creditor may either issue an execution at law, or file a bill in equity to have the conveyance set aside.¹ Where, however, the property is such that it was never subject to execution at law, the only remedy is in chancery.²

243. Two general questions arise, under the statute of Elizabeth; first, *what* conveyances are voidable; and second, as against *whom* are they voidable.

And, in the first place, it is the fraudulent *intent* which invalidates the conveyance. A transfer may be made for a valuable consideration—nay, the consideration may be a full and adequate one; but yet if it is effected with a fraudulent *intent* it will, nevertheless, be void.³

This fraudulent intent may be either express⁴ or implied.⁵

The most usual evidence of a fraudulent intent is found in the absence of consideration. Hence it has been laid down as a rule that a voluntary alienation of property is, in general, void as against creditors.⁶ This rule corresponds with the proviso in the statute of Elizabeth. The statute declares that all conveyances, made with an intent to hinder, delay, and defraud creditors, shall be void as against the parties intended to be injured. It then goes on, in a subsequent section, to provide that this rule shall not apply to *bonâ fide* transfers for a good consideration. Two requisites, therefore, are necessary to the validity of a transfer; first, it must be made in good faith; and, secondly, it must be for a good consideration.⁷ The consideration will not avail if *bona fides* be wanting. The good faith will not save the conveyance if it be made without consideration. The term *good* consideration has been construed to mean a valuable consideration. A *good* consideration, in one sense of the term,

¹ 1 Am. Lead. Cas. 59.

² Botsford v. Beers, 11 Conn. 370; Weed v. Pierce, 9 Cow. 722; 1 Am. Lead. Cas. 59; *post*, Part III., chapter on Creditors' Bills and Administration Suits.

³ Twyne's Case, 3 Co. Rep. 212; 1 Sm. Lead. Cas. 3; Holmes v. Penney, 33 K. & J. 99; Gragg v. Martin, 12 Allen, 498;

Root v. Reynolds, 32 Verm. 139; Kerr on Fraud and Mistake, 200 (Bump's ed.).

⁴ Spirett v. Willows, 3 De G. J. & Sm. 293.

⁵ See notes to Ellison v. Ellison, 1 Lead. Cas. Eq. 284 (4th Eng. ed.).

⁶ See notes to Sexton v. Wheaton, 1 Am. Lead. Cas. 87; 2 Kent's Com. 441.

Clements v. Moore, 6 Wal. 312.

embraces not only those which are founded on value, but those also which are founded on the duties, and obligations, and feelings of relationship, and are therefore termed *meritorious*, as contradistinguished from *valuable*. A good consideration, however, as used in the statute, means one founded on value. A transfer to a wife or child, however meritorious it may be, is not valid as against creditors.¹

244. The consideration, however, although it must be valuable, need not be founded on a *present legal obligation*. It is enough if there is a present *moral* obligation, founded on an antecedent legal obligation. Thus, if A. be indebted to B., but the indebtedness is barred by the statute of limitations, it is not obligatory upon A. to plead the statute. He may, if he sees fit, pay the debt, or transfer property in satisfaction thereof, and the payment or transfer will be good as against his creditors. Upon the same principle a man may pay a debt from which he has been released by the operation of the bankrupt law, and the property so applied cannot be followed by creditors.²

A transfer, in consideration of marriage, is a transfer for a valuable consideration. It must, however, be for some specific marriage. A settlement made in pursuance of an antenuptial *parol* agreement will not be valid.³

245. A transfer of property which is purely voluntary may, under certain circumstances, be sustained. Any one may make a gift, the value of which bears but an insignificant proportion to his estate. If his remaining property is ample to discharge his debts, the transaction cannot be impeached.⁴

A difference of opinion, however, has existed upon this point, and the question becomes much more complicated if debts are subsequently contracted by the voluntary grantor. The true rule seems to be that the gift will be valid if the "donor has, at the time, the pecuniary ability to withdraw the amount of the donation from his estate without the least hazard to his

¹ Bump on Fraudulent Conveyances, Hill on Trustees, 89 (4th Am. ed.), and notes.
248.

² Bump on Fraud. Convey. 249, 250.

⁴ Hopkirk v. Randolph, 2 Brock. 132;

³ Warden v. Jones, 2 De G. & J. 76; 2 Kent Com. 441, notes.

creditors, or in any material degree lessening their prospects for payment."¹

But a fraudulent intent will vitiate a settlement, and may be *implied* from many circumstances. Thus, if the settlor is largely indebted at the time of making the settlement,² or insolvent, or unable to pay his debts after making the voluntary settlement,³ or puts everything into the settlement and thus renders himself insolvent,⁴ the settlement cannot stand.⁵

A voluntary conveyance will be good as against *subsequent* creditors, unless it is made with the fraudulent intent of defeating their claims. Whether such a fraudulent intent does or does not exist is a question of fact, which is to be determined by evidence. The mere circumstance that the alienation is voluntary is not, of itself, a sufficient indication of fraud.⁶ The donor must not, however, be insolvent; or be about to embark in a hazardous business. Nor would the mere fact that the settlor retains enough to pay his existing debts, and actually pays them, be sufficient to render the settlement valid, if the settlement were actually made with the intent to evade the statute.⁷

246. It was decided in England that a voluntary transfer of property, which could not be reached by execution, was not fraudulent as against creditors; and although the decisions upon this point have been conflicting, the doctrine must be considered in England to be well established.⁸ Nevertheless it was there held that while *choses in action* did not fall under the statute of Elizabeth, and therefore creditors could not be said to be prejudiced by their assignment inasmuch as they were not liable to execution, yet in cases falling under the Insolvent Debtors' Acts

¹ See *Jenkyn v. Vaughan*, 3 Drew. 425; *Kent v. Riley*, L. R. 14 Eq. 190; *Snell's Equity*, 64; *Bump on Fraud. Convey.* 291.

² *Thompson v. Webster*, 4 Drew. 628; 4 De G. & Jo. 600; 7 Jur. N. S. (House of Lords) 531.

³ *Freeman v. Pope*, L. R. 5 Ch. App. 538, 541.

⁴ *Smith v. Cherrill*, L. R. 4 Eq. 390, 396.

⁵ *Notes to Ellison v. Ellison*, 1 Lead. Cas. Eq. 285.

⁶ *Sexton v. Wheaton*, 8 Wheat. 229; *Mattingly v. Nye*, 8 Wal. 370; *Townsend v. Westacott*, 2 Beav. 340; *Salmon v. Bennett*, 1 Conn. 525; *Jackson v. Town*, 4 Cowen, 599; 4 Kent Com. 442; 1 Am. Lead. Cas. 37, 40.

⁷ *Holmes v. Penney*, 3 K. & J. 90; 1 Am. Lead. Cas. 40.

⁸ *Story's Eq.*, § 361; 2 Kent Com. 442.

the rule was different, because under these acts all the debtor's property become applicable to the payment of his debts.¹ And *choses in action*, since 1 & 2 Vic., c. 100, have become available for the payment of debts, and are therefore within the statute.² In the United States the tendency is to consider the language of the statute as comprehending all kinds of personal property, including *choses in action*;³ and, moreover, there are, in many States, legislative enactments whereby *choses in action* may be reached by execution.⁴

The English doctrine, therefore, can scarcely be said to exist throughout the United States. Besides, in many of the States, property of an equitable character, and property conveyed in fraud of creditors, may be reached by a *creditors' bill*; a remedy which may be considered as having originated in the case of *Spader v. Davis*,⁵ in the year 1821, and which has been very extensively employed since that time. These bills will be noticed in their proper place under the head of Equitable Remedies.⁶

247. The extent to which a man has the power to make a voluntary disposition of his property, is frequently called into question in the cases of settlements made by a husband upon his wife. There are many decisions to the effect that a gift from a husband to a wife, to be sustained even as against *subsequent* creditors, must be *reasonable*, that is, it must bear a just and fair proportion to the actual amount of his property, and to his condition and prospects in life.⁷ A man cannot denude himself of all or a greater part of his means for the purpose of making a gift to his wife. To allow him to do so would be to open a great door to fraud, for, by putting his property in his wife's name, a man might practically secure the means of support for himself, and at the same time obtain for his property a complete immunity from his liabilities. What the amount of this

¹ See *Norcutt v. Dodd*, 1 Cr. & Ph. 100.

² *Stokoe v. Cowan*, 29 Beav. 637.

³ *Elliott's Exrs. Appeal*, 14 Wright, 82; *Bayard v. Hoffman*, 4 Johns. Ch. 450.

⁴ See 4 Kent Com. 443.

⁵ 5 Johns. Ch. 280. See 4 Kent Com. 443.

⁶ See *post*, Part III., chapter on Creditors' Bills and Administration Suits.

⁷ Notes to *Sexton v. Wheaton*, 1 Am. Lead. Cas. 57. See, also, *Spirett v. Wil- lows*, 34 L. J. Ch. 365; *Wickes v. Clark*, 8 Paige, 161; *Benedict v. Montgomery*, 7 W. & S. 238; *Coates v. Gerlach*, 8 Wright, 43; *Mullen v. Wilson*, *Id.* 413; *Ammon's Appeal*, 13 P. F. Smith, 284; *Mellon v. Mulvey*, 8 C. E. Green, 198.

reasonable provision should be, seems to be a matter of some little doubt. It may be possible that the doctrine itself as to the reasonableness of the provision, would apply only to those cases in which a common law conveyance between husband and wife is attempted to be used, and not where a gift is made through a deed operating under the statute of uses. A gift directly from a husband to a wife is void at law. It is sustained in equity, through the medium of a trust—a chancellor regarding the conveyance as a declaration of trust, and treating the husband as a trustee. But a court of equity will only lend its assistance to a married woman, under such circumstances, when the transaction operates as a *reasonable* provision for her; and the aid of the chancellor, being a matter of grace, will not be extended for the purpose of giving *all* a man's property to his wife, to the detriment of his creditors. But a conveyance to a wife through the medium of a third party—as if A. and his wife convey to B., who then re-conveys to A.'s wife—is good at law, and needs no equitable interposition to support it. It would seem, therefore, that, apart from actual fraud, such a method of settling property upon the wife ought to stand upon the same footing as gifts to a stranger.

248. It must be remembered that conveyances in fraud of creditors are void only as against those who may be injured thereby.¹ Creditors alone have the power to avoid them. The fraudulent grantor himself cannot elect to set the conveyance aside, nor enforce a secret trust for his own benefit. His lips are closed. Nor will equity interfere on behalf of a volunteer, claiming under the grantor.²

In England it was decided that if a debtor made a fraudulent conveyance of his land, and then died, the only persons who had a standing in court to set the conveyance aside were lien creditors. Ordinary bond or simple contract creditors, whose claims had not been reduced to judgment, could not attack the transaction. But in America fraudulent dispositions of property by a debtor during his lifetime can be impeached after his death by

¹ Notes to *Sexton v. Wheaton*, 1 Am. Lead. Cas. 45. See, particularly, *Chapin v. Pease*, 10 Conn. 69; *Burtch v. Elliott*, 3 Indiana, 99. ² See *Dolphin v. Aylward*, L. R. 6 H. L. Cas. 486.

any of his creditors. This is on the ground that property of all kinds in this country is deemed assets for the payment of debts.¹

249. Another class of cases of fraud upon creditors, is where secret advantages are obtained by some creditors, at the expense of others, who are induced to sign composition deeds, of which the supposed basis is equality. Such secret agreements are manifestly fraudulent, and cannot stand the test of the investigation of a court of chancery;² or, in modern times, of a court of law.³

250. Akin to the subject of fraud which affects creditors, is that of fraud as against subsequent purchasers. The statute of 27 Eliz., c. 4, made perpetual by statute 39 Eliz., c. 18, § 31, enacts that every conveyance, grant, charge, lease, limitation of use, of, in, or out of any lands, tenements, or other hereditaments whatsoever, for the intent and purpose to defraud and deceive such persons as shall purchase the said lands, shall be deemed, only against such persons who shall so purchase for money or any good consideration, the said lands, to be wholly void, frustrate, and of none effect.⁴

Even before the act purchasers were not without remedy in such cases in a court of equity; but the statute has rendered their rights precise, and their remedy more extended.⁵

251. There is an important difference between the English and American construction of this statute. In England, it is held that a voluntary conveyance is void as against a subsequent purchaser, even although he may have notice of the same—the theory being that as the voluntary conveyance is rendered void by the statute, no subsequent purchaser is bound to regard it.⁶ In the United States, however, the rule is different; and a pur-

¹ Story, Eq. Jurisp., §§ 375, 376.

² Jackman v. Mitchell, 13 Ves. 581; Wood v. Barker, L. R. 1 Eq. 139; Smith v. Stone, 4 G. & J. 310; Doughty v. Savage, 28 Conn. 146; Case v. Garrish, 15 Pick. 49; Lawrence v. Clark, 36 N. York, 128; Kerr on Fraud and Mistake, 215 (Bump's ed.).

³ Kerr on Fraud and Mistake, 215.

⁴ See notes to Ellison v. Ellison, 1 Lead. Cas. Eq. 283 (4th Eng. ed.).

⁵ Kerr on Fraud and Mistake, 227; Perry Herrick v. Attwood, 2 De G. & J. 21.

⁶ Doe v. James, 16 East, 212; Buckle v. Mitchell, 18 Vesey, 111. See, also, Cathcart v. Robinson, 5 Peters, 265, 279; Hill v. The Bishop of Exeter, 2 Taunt. 69; notes to Sexton v. Wheaton, 1 Am. Lead. Cas. 50, 51; notes to Ellison v. Ellison, 1 Lead. Cas. Eq. 283 (4th Eng. ed.). But this rule is not regarded with satisfaction in England; and, therefore, any consideration, no matter how small or inadequate, will be sufficient to support the first settlement. Bayspoole v. Collins, L. R. 6 Ch. App. 228, 232.

chaser who has notice of a prior voluntary grant will take subject to the rights of the voluntary grantee.¹ But the rule upon this subject is not uniform throughout the United States.²

It is essential to the operation of the statute that both conveyances should be made by the same person. An heir or devisee cannot, by a conveyance for value, defeat a voluntary settlement made by his ancestor or testator; and if the voluntary grantee has conveyed for value, his alienee can hold as against a subsequent purchaser from the original grantor.³

A mortgagee is a purchaser within the statute.⁴ It need hardly be added, that as between the parties to the transaction the voluntary conveyance will be good.⁵

252. The statute of 27 Elizabeth, c. 4, does not apply to personal chattels; but as it is in affirmance of the common law, it would seem, that its principles ought to be applied, with the modifications rendered necessary by the difference in the subject matter, to the transfers of personal property.⁶ The possession of chattels generally follows the title; indeed, a change of possession is, in general, necessary in order to render the sale valid as against the creditors of the vendor;⁷ while delivery is essential to a valid gift. A man, therefore, can rarely be deceived as to the rights of the donee of a chattel; while he may very well be misled as to the rights of a voluntary alienee of real estate. Hence, the donee of personal property ought not, generally, to be disturbed in his possession by a subsequent purchaser, because it is the latter's own folly to buy that of which another has the possession. When, however, the donee or even the vendee of chattels suffers them to remain in the possession of the former owner, and the latter sells them again to a *bonâ fide* purchaser without notice, the title of such purchaser cannot be impeached.⁸

¹ Lancaster v. Dolan, 1 Rawle, 231; Dougherty v. Jack, 5 Watts, 456; Mayor v. Williams, 6 Maryl. 242; 1 Am. Lead. Cas. 51.

² See Sterry v. Arden, 1 Johns. Ch. 261; and 1 Am. Lead. Cas. 51.

³ Kerr on Fraud and Mistake, 229.

⁴ Lancaster v. Dolan, 1 Rawle, 231; Lewis v. Love's Heirs, 2 B. Mon. 345; Ledyard v. Butler, 9 Paige, 132; Clapp v. Leatherbee, 18 Pick. 131.

⁵ See *ante*, p.

⁶ Hudnal v. Wilder, 4 McCord, 294; though see Jones v. Croucher, 1 Sim. & S. 315; Bohn v. Headley, 7 Harris & Johns. 257; Sewall v. Glidden, 1 Judges (Alab.), 52, 61; 1 Am. Lead. Cas. 53.

⁷ Twyne's Case, 1 Smith's Lead. Cas. 33.

⁸ See notes to Lickbarrow v. Mason, 1 Smith's Cas. 1147.

253. The next species of fraud upon third parties, which demands attention, is that which is known as fraud upon marital rights, whereby the expectation by a man of an interest in the property of his intended wife is defeated.

The leading authority upon this subject is *Strathmore v. Bowes*,¹ in which the opinion of Lord Thurlow contains a clear statement of the general doctrine, while the decision itself establishes an important qualification.

The doctrine in question may be stated to be that if a woman during the course of a treaty of marriage makes a voluntary² conveyance of any part of her property, without notice to her intended husband, such conveyance will be treated, in equity,³ as fraudulent and void as against him, and will be set aside by a chancellor on the husband's application.⁴

The plainest case of fraud of this kind is, of course, that in which active deception takes place. If, during the treaty for marriage, a woman expressly holds herself out to her intended husband as entitled to property which will become hers upon marriage, and then makes a settlement without his knowledge, she is guilty of actual fraud, and the settlement cannot stand.⁵ It is clear, also, that the same rule exists if there is a suppression of the truth, and merely a concealment of the settlement, although there may be no active representations that the property is to be subject to marital rights.⁶

254. A question, however, naturally arises here, upon which

¹ 1 Lead. Cas. Eq. 325. See, also, *Wilson v. Daniel*, 13 B. Mon. 351; *Cheshire v. Payne*, 16 *Id.* 618; *Duncan's Appeal*, 7 Wright (Pa.), 67; *Perry on Trusts*, § 213.

² The rule will not apply to a conveyance for value. See *Blanchet v. Foster*, 2 Ves. Sr. 264.

³ The conveyance cannot be treated as void at law. *Logan v. Simmons*, 1 Dev. & Bat. (Law) 13, 16; *Doe v. Lewis*, 11 C. B. 1035. At all events it is not necessarily fraudulent. *Doe v. Lewis*.

⁴ See *Chambers v. Crabbe*, 34 Beav. 457; *Terry v. Hopkins*, 1 Hill. Ch. 1;

Waller v. Armistead's Admrs., 2 Leigh, 11; *Manes v. Durant*, 2 Rich. Eq. 404; *McAfee v. Ferguson*, 9 B. Mon. 475; *Williams v. Carle*, 2 Stockt. Ch. 543; *Duncan's Appeal*, 7 Wright (Pa.), 67; *Linker v. Smith*, 4 Wash. C. C. 224; *Tucker v. Andrews*, 13 Maine, 124.

⁵ See *England v. Downs*, 2 Beav. 528; *Logan v. Simmons*, 3 Ired. Eq. 487.

⁶ *England v. Downs*, 2 Beav. 528. See, however, *Thomas v. Williams*, Mos. 177; *De Manneville v. Crompton*, 1 V. & B. 354, where silence, under the circumstances, was held to be no fraud.

there has been some slight difference of opinion. Suppose the intended husband is entirely ignorant that the woman is possessed of property, and therefore marries her without any expectation that he will acquire any estate by her. In such a case he cannot be said to be disappointed if it turns out that there has been an antenuptial settlement, and can he, therefore, under these circumstances, be heard to complain? This question, however, is now settled in favor of the husband. It is true that he is not deprived of anything which he expected to get, and no anticipations of his are therefore defeated; but, nevertheless, he is deprived of his legal rights, and placed in a position in respect to his wife and her property, which he ought not to occupy, except with his full knowledge and consent.¹

But the rule under consideration does not apply to property of the wife to which the marital rights would not have attached; as where, for example, the woman has a life estate to her separate use, to the exclusion of any future husband, with an absolute power of appointment by deed or will, and exercises the power before marriage, by the execution of a settlement on herself.²

255. It was said above that a disposition of her property by a woman about to marry will be sustained if made for a valuable consideration. The consideration, however, must be *valuable*; for the true rule seems to be (although the law is not, perhaps, free from doubt), that a settlement made upon a meritorious consideration—*e. g.*, for the benefit of the children of a former marriage—will not be good as against the husband.³

The settlement to be fraudulent must be in view of a particular marriage, and it will be so only in respect of the intended husband who was in treaty of marriage at the time of the selling.⁴

A settlement by a woman will not be set aside if the intended husband has notice of it any time—no matter how short the

¹ *Goddard v. Snow*, 1 Russ. 485; *Taylor v. Pugh*, 1 Hare, 608; *Logan v. Simmons*, 3 Ired. Eq. 487. Though see *St. George v. Wake*, 1 My. & K. 622. See, also, *Downes v. Jennings*, 32 Beav. 290; *Prideaux v. Lonsdale*, 1 De G. J. & Sm. 433.

² *Cole v. O'Neill*, 3 Maryl. Ch. 174.

³ *Blanchet v. Foster*, 2 Vesey, 264. Though see *Green v. Goodall*, 1 Cold. 404.

⁴ *Strathmore v. Bowes*, *ante*.

interval may be—before the marriage.¹ Nor does the circumstance that the husband is a minor at the time of the marriage make any difference. He will, if he consents to the arrangement, or has knowledge of it, be precluded from disputing it after he attains his majority.²

If the husband, after the marriage, acquiesces in and confirms the settlement, he cannot afterwards be heard to dispute it.³

A man may, by his conduct before marriage, deprive himself of his right to impeach a settlement made without his knowledge. Thus, where a woman was seduced by her intended husband before marriage, and afterwards made a disposition of the property of which he had no notice, it was, nevertheless, held that under the circumstances he was not entitled to have the settlement set aside.⁴

The rule which forbids a disposition of property by a woman, in contemplation of marriage, to the injury of the rights of her intended husband, has also been applied to the case of a man conveying his property away in fraud of an intended wife.⁵

256. Another class of frauds upon third parties, comprises those cases in which there is a fraudulent exercise of a power.

A power, in the sense it is here used, is an authority enabling a person, through the medium of the statute of uses, to dispose of an interest vested in himself or some third person. Thus, land may be conveyed to A. in trust for such uses as B. should appoint; or in trust for such person or persons generally as B. should appoint; or in trust for such members of a particular class—as children, grandchildren, or the like—as B. should appoint. This right of appointment in B. is called a power. The person who creates the power is the *donor*; the person by whom it is to be exercised is called the *donee of the power*, or, when he actually exercises it, the *appointor*; the person in whose favor the appointment is made is the *appointee*; and those for

¹ *Terry v. Hopkins*, 1 Hill Ch. 1, 5; *Simmons*, 3 Ired. Eq. 487; *Mann v. Cheshire v. Payne*, 16 B. Mon. 618; *St. Durant*, 2 Rich. Eq. 404.

George v. Wake, 1 My. & K. 610.

⁴ *Taylor v. Pugh*, 1 Hare, 608.

² *Slocombe v. Grubb*, 2 Bro. C. C. 545.

⁵ *Smith v. Smith*, 2 Halst. Ch. 515;

³ *England v. Downs*, 2 Beav. 528; 1 *Petty v. Petty*, 4 B. Mon. 215. Lead. Cas. Eq. 421. But see *Logan v.*

whose benefit the power was intended to be executed are termed the *objects* of the power.

Powers of this kind are of very frequent occurrence in English marriage settlements, being the ordinary machinery whereby marriage portions are raised, and the distribution of funds among children or other beneficiaries regulated.

It is a cardinal principal in the law of powers that "a person having a power must execute it *bonâ fide* for the end designed, otherwise it is corrupt and void." This was the language of Lord Keeper Henley in *Aleyn v. Belchier*, which is the leading authority upon this subject.¹ If a power is not exercised in good faith, and for the purposes for which it was created, its exercise will be deemed fraudulent in equity, and will be set aside upon a bill filed by a party in interest.

A case in which a power is thus improperly exercised, is said to be a case of "a fraud upon the power."

The plainest case of a fraud upon a power, is where the power is exercised for the personal advantage of the appointor. If a father has a power to appoint among children, and agrees with one of them, for a sum of money, to appoint to him, such appointment would be void. *Aleyn v. Belchier*, and *Lane v. Page*,² are instances in which powers to raise marriage portions have been improperly exercised for the purpose of paying the debts of the appointor, and the appointment has, in consequence, been set aside. The same rule applies to appointments made with a view to obtain the fund appointed through undue influence over the appointee,³ or with an expectation of the appointee's death and succession to his estate;⁴ or to any case in which the motive of the appointor is to acquire any benefit for himself either directly or indirectly.⁵

Again, the appointment will be considered fraudulent and invalid, if it is exercised for the benefit of a stranger, and not for the advantage of the objects of the power; and this will be so although the appointee may be unaware of the fraudulent design of the appointor.⁶

¹ 1 Lead. Cas. Eq. (4th Eng. ed.) 377.

² Ambler, 233.

³ Marsden's Trusts, 4 Drew. 601.

⁴ Wellesley v. Mornington, 2 K. & J. 143.

⁵ Duke of Portland v. Topham, 11 H. L. Cas. 32.

⁶ Marsden's Trusts, 4 Drew. 601. But an appointment will not be set aside if the bargain did not induce the appoint-

257. A power will, also, be deemed to be improperly exercised if it is used for any purposes other than those for which it was created. The appointment must be made with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object—sinister in the sense of its being beyond the purpose and intent of the power. There must be a pure, straightforward, honest dedication of the property, as property, to the person to whom the appointor affects or attempts to give it.¹

The circumstance that the donor of the power may acquiesce in, or even favor the fraudulent exercise of the power, will not render such exercise valid, if the appointment is one calculated to defeat the purposes for which the power was created. The fraud for which a court of equity sets such an appointment aside, is not a fraud upon the donor, but a *fraud upon the power*. If the purpose of the *power* is defeated, the consent of the donor cannot make the appointment good. *Lee v. Fernie*² and the Duke of Portland's case are illustrations of this doctrine. In the first case, an appointment for the benefit of a stranger was deemed invalid, although made in pursuance of an arrangement with the donor of the power. In the latter, the invalid appointment was made in pursuance of the expressed wish (agreed to by his children) of the late Duke of Portland (the testator); and yet the appointment was held bad, because made, not with the view of carrying out the purpose of the power, but with the view of discountenancing a marriage of the Duke's sister with Colonel Topham.

If, however, the donee of a discretionary power acts with *bona fides* and with his own good judgment, and with an honest intention of carrying out the purpose of the power, the mere circumstance that he has given a promise to the donor to exercise the power in a certain way, will not disqualify him. And

ment. See *Cooper v. Cooper*, L. R. 5 Beav. 525; 1 De G. J. & Sm. 517; 11 Ch. App. 212. Children may contract H. L. Cas. 32; L. R. 5 Ch. App. 40. with *each other*, to give the parent who is See, also, *Salmon v. Gibbs*, 3 De G. & the appointor some advantage. *Davis v. Sm.* 343.
Uphill, 1 Swanst. 130. ² 1 Beav. 483.

¹ *Topham v. The Duke of Portland*, 31

evidence is admissible to show that the donee acted on his own judgment, and that *that* judgment coincided with his promise.¹

An appointment bad in part will generally be invalid *in toto*.

But a good appointment in favor of one child, will not be invalidated by a fraudulent appointment to another, if the two can be separated.²

258. Having examined the different heads of fraud, it will be proper, before leaving the general subject, to notice briefly one or two rules which have been laid down by courts of chancery, for the purpose of effectually securing the relief to which the injured party is entitled.

It is one of the rules of evidence at common law that parol testimony shall not be admitted for the purpose of varying, adding to, or taking away from the language of a written instrument; the reason for the rule being the obvious one that where an agreement has been reduced to writing by the act and consent of the parties, its terms should be sought for in the instrument which has been selected as the repository and evidence of the purpose of the contracting parties, and not on one side of it, in extrinsic facts or allegations.³ It will also be remembered that the statute of frauds requires that the creation and transfer of certain estates in land shall be manifested and proved in writing; and that contracts of a certain kind shall not be enforced unless there exists some written memorandum of the same, signed by the party who is sought to be charged therewith. Now, it is manifest, that, if the common law rule of evidence above stated and the provisions of the statute of frauds were rigidly adhered to without any exceptions whatever, great injustice would in many instances ensue, and that these legal rules would become simply the refuge and hiding places of fraud.

It is, therefore, established in equity that no rule of law shall be used for the purpose of protecting fraud; and that while in general the rules of evidence are the same in equity as at law,⁴ yet in cases of accident, mistake, and fraud, parol evidence is admissible for the purpose of making out the complainant's case, although the effect of the admission may be to alter, or add to, a

¹ *Library Co. v. Williams*, 30 Leg. Int. 177; overruling *Mercur, J.*, *Id.* 4.

² *Rowley v. Rowley*, Kay, 242.

³ American note to *Woollam v. Hearn*, 2 Lead. Cas. Eq. 670.

⁴ *Manning v. Lechmere*, 1 Atk. 453.

written instrument, or to affect the title to real estate. This equitable rule arises from the necessity of the case, and in order that the jurisdiction of courts of chancery in such cases (particularly those of fraud) may be effectively asserted; for, as was said by Lord Thurlow, "the moment you impeach a deed for fraud, you must either deny the effect of fraud on a deed, or you cannot but be under the necessity of admitting parol evidence to prove it."¹ This doctrine has been followed by very many cases both in England and in the United States; although the decisions throughout the Union, upon the application of the doctrine, have not been altogether harmonious. In some States, as in New York² and Pennsylvania,³ the tendency has been to give very great latitude to the admission of parol evidence; in others, such as Massachusetts, the inclination of the courts has been the other way.⁴ The application of this doctrine is seen in those cases in which absolute deeds may be shown to be mortgages; in which specific performance is sought to be resisted or enforced; in which the reformation of written instruments is decreed; as well as in cases of fraud, accident, or mistake.⁵

It need scarcely be added that when parol evidence has been admitted for the purpose of raising a presumption of fraud, it is equally admissible on behalf of the defendant for the purpose of rebutting that presumption.

259. The right to impeach a transaction on the ground of fraud may be lost by confirmation, by release, by acquiescence, or by delay; and such a right has no place as against a *bonâ fide* purchaser for a valuable consideration, without notice.⁶

In reference to confirmation and release, it need only be said that when such defences are relied on, it must clearly appear that the party confirming was fully apprised of his right to impeach the transaction; and that he acted freely, deliberately,

¹ *Shelburne v. Inchiquin*, 1 Bro. C. C. 338; *Hill on Trustees*, 166.

² *Gillespie v. Moon*, 2 Johns. Ch. 585; *Keisselbrack v. Livingston*, 4 *Id.* 144.

³ *Thomson's Lessee v. White*, 1 Dallas, 447; *Beegle v. Wentz*, 5 P. F. Sm. 369; *Cook v. Cook*, 19 *Id.* 443; *Wolford v. Herrington*, 30 Leg. Int. 380.

⁴ *Locke v. Whiting*, 10 Pick. 279; *Glass v. Hulbert*, 102 Mass. 24. This

subject will be found discussed at length in the American note to *Woollam v.*

Hearn, 2 Lead. Cas. Eq. 670. See, also, *Hill on Trustees*, 166; and 1 Sug. V. and P. 243 (8th Am. ed.), note by Perkins, where the authorities are collected.

⁵ See *ante*, Part I., Chap. VII.; *post*, Part III., Chap. II. and III.

⁶ *Kerr on Fraud and Mistake*, Chap. I., Sec. VI.

and advisedly, with the intention of confirming a transaction which he knew, or might, or ought, with reasonable or proper diligence, to have known to be impeachable.¹

A transaction, originally voidable on the ground of fraud, may become unassailable in consequence of the acquiescence of the injured party in the state of affairs which has resulted from the fraudulent act. A man who has a right to avoid a contract cannot take the chance of its turning out advantageously to himself, and then, after abiding the event, and finding that it has turned out to his disadvantage, elect to avoid it.² But an acquiescence which is the result of ignorance of material facts goes for nothing. The party must have knowledge of the facts, in order that acquiescence may be brought home to him.³

260. A person who is injured by fraud must be prompt in seeking redress. A court of equity does not encourage stale claims, and a party may lose his right to complain of a fraud by his delay.⁴ There is, perhaps, no certain rule as to the length of time which will bar the right to relief in cases of fraud. What is a reasonable time must depend upon the discretion of the court, the exercise of which will be regulated by the circumstances of the particular case.⁵ Thus, in *Michoud v. Girod*⁶ it was said that a court of equity would not refuse relief within the lifetime of either of the parties upon whom the fraud is proved, or within *thirty* years after it becomes known to the party whose rights are affected by it; and in *Gresley v. Mousley*⁷ a transaction between solicitor and client was set aside two years after the death of the former, and eighteen years after that of the latter. On the other hand, cases have occurred in which the utmost promptness has been required. Of these, instances may be found in those cases in which shareholders of companies have sought to repudiate their allotments and recover their money on the ground of misrepresentation, and in which the greatest vigilance and diligence have been exacted.⁸

¹ Kerr on Fraud and Mistake, 296.

⁷ 4 De G. & J. 78.

² *Ormes v. Beadel*, 2 De G. F. & J. 833.

⁸ See *Heyman v. European Central Railway Co.*, L. R. 7 Eq. 154; *Denton v. MacNeil*, 2 *Id.* 352; *Taite's Case*, 3 *Id.* 795; *Whitehouse's Case*, *Id.* 794. See, also, *Reese River Mining Co. v. Smith*, L. R. 4 H. L. Cas. 64.

³ Kerr on Fraud and Mistake, 298, 300.

⁴ See *ante*, p. 48, Maxim III.

⁵ Kerr on Fraud and Mistake, 305.

⁶ 4 Howard, 561.

In many cases courts of equity have taken the statutes of limitation as standards, by which to measure the time properly allowable for the assertion of an equitable right. But this is by analogy only; and the courts of equity will not hesitate to apply their own doctrines, as to delay, whenever the circumstances of the case require it.¹

It was stated above,² that the right to set aside a transaction on the ground of fraud, has no place as against a *bonâ fide* purchaser for a valuable consideration without notice. This is due, however, rather to the existence of certain distinct equities, which all, perhaps, grow out of fraud, but which seem to require a separate consideration. These are the equities of notice and of a *bonâ fide* purchaser for value; and they will be attempted to be explained in the succeeding chapter.

CHAPTER III.

NOTICE.

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| 261. Doctrine of notice not applicable to contests between purely legal titles. | 269. Constructive notice; Vice-Chancellor Wigram's division. |
| 262. Applicable to equitable titles; <i>Le Neve v. Le Neve</i> . | 270. Notice by registration. |
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| 264. Equitable owner may avail himself of want of notice; <i>Colyer v. Finch</i> . | 272. Effect of actual notice of unregistered conveyance. |
| 265. Extent of protection afforded by want of notice. | 273. Constructive notice of same. |
| 266. English rule that payment of purchase-money and acquisition of legal title must both precede notice. | 274. <i>Lis Pendens</i> . |
| 267. Rule in United States; protection <i>pro tanto</i> . | 275. Plea of <i>bonâ fide</i> purchaser for value. |
| 268. Notice actual and constructive; actual notice. | 276. Can be used by the holder of an equitable title. |
| | 277. Doctrine of seeing to the application of purchase-money. |
| | 278. Abolished in England. |
| | 279. Of little importance in the United States. |

261. In a conflict between purely legal titles, the circumstance that one of the parties, at the time he acquired his rights, had

¹ See Kerr on Fraud and Mistake, 304; Hill on Trustees, 168. ² *Supra*, p. 253.

any knowledge of the existence of the adverse claim, is a fact which is entirely immaterial, and is regarded as of no consequence whatever in determining the judgment of the court.

If A. buys a legal title to an estate, it is a matter of no moment that, at the time of his purchase, he was aware that a different legal title to the same property was vested in B.¹

Each party stands or falls on his strict right. If A.'s title is superior, his knowledge of B.'s title cannot interfere with his recovery; if inferior, his ignorance of B.'s better title is no protection.

Thus, in a contest between a party claiming under a paper title, and one claiming simply by virtue of adverse possession, each party bases his right of recovery, not upon an *equitable*, but upon a *legal* title, and it can make no possible difference that he who claims by virtue of an adverse possession had notice of the legal paper title; but, on the contrary, his notice thereof would be an element to show that the adverse possession was hostile in its character, and, therefore, capable, if continued for a sufficient time, of ripening into an unassailable title.

Another illustration of the doctrine may be found in the rule which exists in England and in some of the United States upon the subject of voluntary conveyances. According to that rule a subsequent grantee is entitled to avoid a prior voluntary conveyance, although he had notice of the same at or before the date of the conveyance to himself. Notice, under this view of the law, cannot vary the question, for it is only notice of a conveyance which was void against a subsequent purchaser for a valuable consideration;² in other words, it is only notice of a defeasible legal title.

It will be remembered, however, that in some of the United States, as in Pennsylvania (for example), a subsequent purchaser for value cannot avoid a prior grant if he has notice of the same. But the ground upon which the courts in some of the States

¹ Except in cases where the rule is altered by statutes in regard to recording conveyances, under which it has been held in some States, that the notice of a prior unregistered conveyance will postpone a second grantee who has recorded his

deed. See *Troy City Bank v. Wilcox*, 24 Wis. 671; *post*, p. 265.

² Per Lord Ellenborough in *Doe v. James*, 16 East, 212; note to *Sexton v. Wheaton*, 1 Am. Lead. Cas. 46.

have thus refused to follow the English rule is that the legal title acquired by the second purchaser is bad, because the second sale is a fraud on the part of the vendor, and if the second vendee has notice of the first conveyance, the purchase itself is an act of collusion.¹

262. Where, however, equitable titles and rights are concerned, the rule is different. A man who acquires, even for valuable consideration, a legal title with the knowledge that it is affected by an equity, takes it subject to that equity; *a fortiori* is his acquisition so subject, if it is the purchase of a new *equitable* title. On the other hand, a purchaser may often defend himself against the assertion of an equitable right, on the ground that when he paid his money he did not know that any such right existed.

The principle in these cases has been well stated by a learned writer to be that an interest which, if legal, would be indefeasible, shall not be defeated by reason of its equitable character, by a party who has notice of it. If being legal it may be defeated at law, there is no equity to preserve it.²

In the leading case of *Le Neve v. Le Neve*³ this doctrine is stated by Lord Chancellor Hardwicke in the following language: "A person who purchases an estate (although for valuable consideration), after notice of a prior equitable right, makes himself a *malâ fide* purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest."

"Fraud or *mala fides*," said the same learned judge, "is the true ground on which the court is governed in cases of notice." The subject of Notice may, therefore, with propriety be discussed immediately after that of Fraud; although, from its importance, it seems proper to treat it as a distinct head of equity jurisprudence.

263. The cases in which the doctrine of notice is applicable are numerous.

If a man holds the legal title to an estate, but his conscience is affected with a *trust* in favor of another, he may sell the estate, and the purchaser, if he buys *bonâ fide* and for value, and

¹ *Lancaster v. Dolan*, 1 Rawle, 246.

³ 3 Atk. 646; 2 Lead. Cas. Eq. 23.

² *Adams's Equity*, 152.

has no notice of the trust, will take it discharged of the same, and the remedy of the *cestui qui trust* will be against the trustee alone.¹

But if the purchaser has notice of the trust, he will be bound in the same way as the original trustee; in other words, he will be construed to hold the legal title as a trustee for the equitable owner.²

The same rule will be enforced for the protection of prior equitable vendees—(*i. e.*, vendees under agreements not consummated by a conveyance of the legal title)—holders of an equitable or of a defective mortgage—vendors who have parted with the legal title, but who still may have an equitable lien for unpaid purchase-money; purchasers under an unregistered conveyance,³ and parties for whose benefit covenants have been entered into which affect the land, although they may not technically run with the land.⁴

On the other hand, want of notice will operate to protect one who buys from a trustee, or a subsequent vendee, or mortgagee who gets in the legal title, or a purchaser under a duly registered conveyance.

264. There was, at one time, a conflict of authority upon the point whether the want of notice as a defence, can be taken advantage of by the holder of an equitable, as well as of a legal title. It was held, in some few cases, that it could not;⁵ but more recent and better considered decisions have settled that the holder of an equitable title can protect himself by want of notice, as well as one who has a legal title.⁶ It is very true that the assignee of an equity takes it subject to prior equities; but this rule only applies when the equities are, in all other respects,

¹ *Basset v. Nosworthy*, 2 Lead. Cas. Eq. 1; *Perry on Trusts*, § 218.

² *Hill on Trustees*, 164 (259, 4th Am. ed.), and notes; *Perry on Trusts*, § 217.

³ *Notes to Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 35.

⁴ *Tulk v. Moxhay*, 2 Phill. 774; *Wilson v. Hart*, L. R. 1 Ch. App. 463; *Western v. McDermott*, L. R. 2 Ch. Ap. 72. See, also, *Keates v. Lyon*, 4 *Id.* 218.

⁵ *Williams v. Lambe*, 3 Bro. C. C. 264; *Collins v. Archer*, 1 Rus. & My. 284;

Snelgrove v. Snelgrove, 4 Desaus. 288. See *Phillips v. Phillips*, 8 Jur. (N. S.) 145; and *Chew v. Barnet*, 11 Serg. & Rawle, 387.

⁶ *Colyer v. Finch*, 5 H. L. Cas. 920; *Wallwyn v. Lee*, 9 Ves. 24; *Joyce v. De Moleyns*, 2 J. & L. 374; *The Queen v. The Shropshire Union Co.*, L. R. 8 Q. B. 420; *Ernest v. Vivian*, 33 L. J. Ch. (N. S.) 513; *Wood v. Mann*, 2 Sumn. 557; *Rhines v. Baird*, 5 Wright (Pa.), 267.

equal,¹ and not when the equity of want of notice is introduced to turn the scale. The defendant, in such a case, has a right to avail himself of the plea of being a *bonâ fide* purchaser for value without notice; and if his plea is true, in point of fact, no relief can be had against him.²

265. One who has notice of a prior equity may resist its enforcement under cover of want of notice in his immediate vendor. Thus if A. were the holder of an estate which was subject to a secret trust, which was known to C., and A. were to convey the estate to B., an innocent purchaser who had no notice, and B. should afterwards sell to C., the latter could protect himself against the claims of A.'s *cestui qui trust*, by setting up the want of notice in B. his immediate vendor. The reason of this rule is obvious. It is designed not for the benefit of C., but for that of B. For it might be possible that after the sale to B. something would occur which would put all the world upon notice of the trust, and no one could thereafter take the estate unaffected with notice. The estate, therefore, would be locked up in B.'s hands, and rendered unsalable, because he could never find a purchaser who was free from notice. To protect B., therefore, the rule has been laid down as above set forth.³ If, however, in the case above put, B. should sell again to A., or the estate should afterwards by *mesne* conveyances come into A.'s hands, the trust would re-attach; the reason of this being that it would be a gross outrage to allow the man who had originally perpetrated the wrong to reap the benefit of it, while, at the same time, it would be no hardship upon B., for only one customer (A.) would thus be removed from the market.⁴

A person who has no notice, will not be affected by notice on the part of his immediate vendor. Whenever the chain of conveyances reaches an innocent purchaser for value, who takes the legal title, the doctrine of notice no longer applies.⁵

¹ Rice v. Rice, 2 Drew, 73, *ante*, pp. 177, 178. Rankin, 4 Bibb, 482; Perry on Trusts, §§ 222, 830.

² *Post*, pp. 268, 269.

³ See Clowther v. Carlton, 2 Atk. 242; Harrison v. Forth, Prec. Ch. 51; Fletcher v. Peck, 6 Cranch, 133; Boynton v. Rees, 8 Pick. 329; Mott v. Clark, 9 Barr, 399; Curtis v. Lunn, 6 Munf. 42; Lindsey v. Rankin, 4 Bibb, 482; Perry on Trusts, §§ 222, 830.

⁴ See Troy City Bank v. Wilcox, 24 Wis. 671; Kennedy v. Daly, 1 Sc. & Lef. 379; Perry on Trusts, § 222.

⁵ DeMarest v. Wynkoop, 3 Johns. Ch. 147.

266. Important questions in the doctrine of notice grow out of the consideration of the *time* when the notice is given.

It is clear that notice ought to bind, if it is given or presumed to be given, before the purchaser either acquires the legal title or parts with his money. It is equally clear that notice after conveyance and payment of the consideration is too late. What then is the rule in the two intermediate cases which sometimes occur—viz., *first*, where a vendee gets the legal title, but notice comes to him before he pays the purchase-money; and *second*, where he pays the purchase-money in ignorance of the prior equity, but is affected with knowledge of the same before obtaining his deed.

In England the rule is that in order to protect a purchaser, the transaction must be complete in both particulars before notice; that is to say, the vendee must actually have received his conveyance and paid his money. If he has done only one of these, his right will be inferior to the right of the holder of the prior equity. He must, to be protected, hold the legal title, and have paid the full amount of the purchase-money.¹

267. In the United States, also, the rule is the same in cases in which the legal title is conveyed, but the purchase-money not paid, at the time of the notice.² In such a case the purchaser has no equity, for he has lost nothing; and even if he has given security for the purchase-money, he could not lose, because he could set up the failure of title as a defence.³

But when there has been a payment of purchase-money in part or in whole, and notice then intervenes before the acquisition of the legal title, the English rule is followed in the courts of some of the United States, but in others a different doctrine is held.⁴ Thus, in Pennsylvania and some other States, a payment of part of the purchase-money is a protection *pro tanto*.⁵

¹ See American note to *Basset v. Nosworthy*, 2 Lead. Cas. Eq. 101; *Tourville v. Naish*, 3 P. Wms. 307; *Story v. Windsor*, 2 Atk. 630; *Wigg v. Wigg*, 1 Atk. 384; 2 Sug. V. and P. 523; *Perry on Trusts*, § 221. See, however, 2 Dart V. and P. 760.

² See *Blanchard v. Tyler*, 12 Mich. 339; *Palmer v. Williams*, 24 *Id.* 333; *Mur-*

ray v. Ballou, 1 Johns. Ch. 566; *Patten v. Moore*, 32 N. Hamp. 382; *McBee v. Loftis*, 1 Strob. Eq. 90; *Perry on Trusts*, § 221.

³ *Perry on Trusts*, § 219. •

⁴ Notes to *Basset v. Nosworthy*, 2 Lead. Cas. Eq. 116.

⁵ See *Youst v. Martin*, 3 Serg. & R. 423; *Bellas v. M'Carty*, 10 Watts, 13; *Juvenal v. Jackson*, 2 Harris, 519; *Frost*

268. Notice is either *actual* or *constructive*. Actual notice consists in direct information of a fact, brought directly home to a party; or a knowledge of circumstances which should lead him to a knowledge of such fact.¹

Constructive notice is notice which is fastened upon a party by presumption of law deduced from facts and circumstances—the facts and circumstances which give rise to the presumption requiring proof—but the presumption itself when once established being incapable of being disproved. To use the definition usually given, it is no more than evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted.²

Actual notice must consist in certain and definite information, as distinguished from vague rumors;³ and, as a general rule, it may be stated that notice must come from some person who is interested in the property, for a purchaser is not bound to attend to statements by mere strangers.⁴ But as actual notice cannot mean anything more or higher than direct knowledge, it is difficult to see how a party can disregard information concerning a title, as to which he is in negotiation, even though coming from a stranger.⁵

Notice to an agent is notice to the principal; and it is to be considered as actual, and not as constructive notice; because the principal and agent, in matters within the scope of the latter's authority, are regarded, in the eye of the law, as one.⁶

It was at one time held that the notice to the agent in order to affect the principal, must be in the same transaction in which

v. Beekman, 1 Johns. C. R. 288; *Paul v. hart v. Greenshields*, 28 Eng. L. and Eq. Fulton, 25 Missouri, 156. See, also, 77.

Fraim v. Frederick, 32 Tex. 294.

¹ *Mayor v. Williams*, 6 Maryl. 235; *Harper v. Ely*, 56 Ill. 194.

² 2 Sug. V. and P. 755 (528, 8th Am. ed.); notes to *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 152, 157.

³ *Massie v. Greenhow*, 2 P. & H. 255; *Williamson v. Brown*, 15 N. Y. 354.

⁴ *Butler v. Stevens*, 26 Maine, 484; *The City Council v. Page*, 1 Spear's Eq. 159; *Kerns v. Swope*, 2 Watts, 75; *Barn-*

⁵ *Ripple v. Ripple*, 1 Rawle, 386; *Wilcox v. Hill*, 11 Mich. 256; American note to *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 157.

⁶ *Hough v. Richardson*, 3 Story, 660; *Bowman v. Wathen*, 1 Howard, 195; *Astor v. Wells*, 4 Wheat. 466; *Westervelt v. Haff*, 2 Sandf. Ch. 98; *Watson v. Wells*, 5 Conn. 468; *Braken v. Miller*, 4 Watts & Serg. 102.

the former is acting on behalf of the latter.¹ Thus a client (it was said) could not be affected with notice of a fact of which his counsel has obtained information when acting on behalf of another party. But the rule is now held to be otherwise in England; and the change is one in accordance with sound principle and good sense, as will appear from an examination of the opinion of Mr. Justice Bradley in the case of *The Distilled Spirits*, in the Supreme Court of the United States.²

269. Constructive notice has been already defined, although the courts have not unfrequently hesitated to say with precision in what it shall consist; and the tendency in modern decisions is to limit the sphere of its operation.

The definition stated above has been given with not a little diffidence, as it seems presumptuous, in the highest degree, to attempt to define what constructive notice is, when great authorities have endeavored to do so without success.³

Vice-Chancellor Wigram, in *Jones v. Smith*,⁴ divided constructive notice into two classes, as follows—first, cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered, or in some way affected, and the court has, thereupon, bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, encumbrance, or other circumstance affecting the property, of which he had actual notice. And, secondly, cases in which the court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice.⁵ To these two classes may, perhaps, be added a third, viz., cases in which the party charged is presumed by the policy of the law, or by virtue of the provisions of some statute, to be cognizant of some proceedings pending or act done in relation to the property in question whereby its title is affected.

Of the first of these classes of constructive notice an instance

¹ *Warrick v. Warrick*, 3 Atk. 294. See, also, *Bracken v. Miller*, 4 Watts & Serg. 111; *Smith's Appeal*, 10 Wright (Pa.), 128. *Farmers' Bank*, 83 Verm. 252; 2 Sug. V. and P. 532 (8th Am. ed.).

³ See 2 Sug. V. and P. 570.

² 11 Wallace, 366. See, also, *Dresser v. Norwood*, 17 C. B. (N. S.) 466 (and American note by Wister); *Hart v. The Boxheimer v. Gunn*, 24 Mich. 379.

⁴ 1 Hare, 43. See *Reed v. Gannon*, 50 N. Y. 345.

⁵ See *Babcock v. Lisk*, 57 Ill. 329;

will be found in *Penny v. Watts*, a decision which has carried the doctrine under consideration very far, and which has, therefore, been criticized by great authority; but which is, nevertheless, with this qualification, a good illustration of the doctrine itself.¹

Of the second class, *Birch v. Ellamer*² (where a mortgagee, who had notice of the deposit of title deeds, but avoided inquiring the purpose for which it had been made, was held to be affected with notice of that purpose) is an example.

It is, moreover, perfectly well settled that a purchaser will have constructive notice of everything which appears in any part of the deeds or instruments which prove and constitute the title purchased, and is of such a nature that if brought directly to his knowledge would amount to actual notice.³ And where it is the duty of a person to demand the production of title deeds, he will be held to have notice of all the facts of which the production would have informed him.⁴

270. The third class of cases includes those in which notice is given by registration of conveyances, and by *lis pendens*—the former depending upon statutory regulations—the latter upon a general principle of law which discourages alienation of the subject of a suit pending litigation.

The doctrine of constructive notice under the recording acts, is one which, of course, depends both in England and in this country upon statute; and, stated in general terms, it is simply this: that where an instrument, which is entitled to be recorded,

¹ *Penny v. Watts*, 1 MacN. & G. 150. In this case, where a man who claimed under a marriage settlement as a purchaser without notice, had notice previous to his marriage that a legatee had given up her legacy under a will in favor of the intended wife, to whom the estate upon which it was charged belonged, and which was comprised in the subsequent marriage settlement, and had, also, notice that the intended wife had in consequence devised to the legatee a portion of the estate, and that the legatee was dead; it was held to be notice, as leading to an inquiry, of an equitable reversionary title

in the husband of the legatee under a subsequent agreement with the lady, the deviser, before her marriage, to convey the devised estate to him. See 2 Sug. V. and P. 550 (8th Am. ed.).

² 2 Anstr. 427.

³ American note to *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 168, 169; *George v. Kent*, 7 Allen, 16; *Montefiore v. Brown*, 7 H. L. Cas. 241.

⁴ *Peto v. Hammond*, 30 Beav. 509; *Kellogg v. Smith*, 26 N. Y. 18. See Sug. V. and P., Chap. XXIV., where the whole subject of notice is discussed at length, and the cases examined.

is duly executed and acknowledged, and is recorded in the proper territorial limits, such a registration is notice of the contents of the instrument,¹ and of all legal and equitable rights and titles created thereby, to any person claiming from or under the same grantor, by virtue of any title which existed in him at the time of the date of the duly recorded conveyance.² And it may be further stated that actual knowledge on the part of a subsequent grantee, of the existence of a prior unrecorded deed, will be equivalent, so far as he is concerned, to registry, and will be so treated both at law and in equity; but whether or not the same effect will be given to merely constructive notice of a prior unrecorded deed, is a question upon which the authorities in the different States are not uniform.

271. It will be observed, by referring to the above general statement, that constructive notice arises from the recording of those instruments only which are required to be registered. Thus (for example), where personal property is conveyed by a registered deed, the registry is not of itself constructive notice of the transfer, for transfers of such property are not required to be registered. And this was held to be the case even where the deed conveyed real as well as personal property, and was, therefore, a recordable instrument as a conveyance of realty.³ If, therefore, the deed is one which is not required or authorized by law to be recorded, the mere act of putting it on record cannot affect subsequent purchasers, with notice of its contents or of any rights claimed under it. And the same rule will apply to cases in which deeds are not executed or acknowledged in the manner and form to entitle them to be recorded.⁴

Conveyances, to operate by way of constructive notice, must also be recorded within the territorial limits prescribed by the statute. Therefore, where a deed is recorded in the wrong

¹ See *Bancroft v. Consen*, 13 Allen, 50. *Drinker*, 7 Watts & Serg. 440; 4 Kent's

² 4 Kent's Com. 174, 175 (11th ed.); 2 Com. (11th ed.) 174; *Yeister v. Fortner*, Sug. V. and P. 539 (8th Am. ed.). 2 Binney, 40; *Parkist v. Alexander*, 1

³ *Pitcher v. Barrows*, 17 Pick. 361. Johns. Ch. 394; *Graham v. Samuel*, 1 See *Boggs v. Varner*, 6 Watts & Serg. 469. Dana, 166; *Thomas v. Grand Gulf Bank*,

⁴ See, upon this subject, *Stevens v. Morse*, 47 N. Hamp. 532; *Sumner v. Rhodes*, 14 Conn. 135; *Isham v. Bennington Iron Co.*, 19 Verm. 230; *Green v.* 9 Sm. & M. 201; *Brown v. Budd*, 2 Carter (Ind.), 442; *Work v. Harper*, 24 Miss. 517; *Parret v. Shaubhut*, 5 Minn. 323.

county or in the wrong State, the record cannot operate as notice.¹ Nor is the record notice to any one except those who claim title under the same grantor.²

272. It was decided in the year 1747, in the leading case of *Le Neve v. Le Neve*,³ that a registered, will be postponed to an unregistered conveyance, if the purchaser under the former has notice at the time, of the existence of the latter. This decision has been the subject of much regret in England, as it has been supposed (and with no little justice) to infringe upon the policy of the Registration Acts; but it has, nevertheless, been followed in a number of authorities; and the law must be considered as settled in accordance with that decision.⁴ A similar view of the law has been adopted in the United States; and the general rule is held to be that actual knowledge of a prior unrecorded deed will operate to postpone the subsequent purchaser.⁵

273. But whether the same effect is to be given to *constructive* notice, is a question upon which the authorities are not uniform. In England it is now held that constructive notice of an unregistered conveyance will be enough to postpone a subsequent purchaser although he has registered his deed.⁶ Similar decisions have been made in many of the United States. Thus, in New York and in Maryland, it has been held, that constructive

¹ *Astor v. Wells*, 4 Wheat. 466; *Kerns v. Swope*, 2 Watts, 75; *Hundley v. Mount*, 8 Sm. & Marsh. 387; *Lewis v. Baird*, 3 McLean, 56; *Crosby v. Huston*, 1 Tex. 203.

² *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Lightner v. Mooney*, 10 Watts, 412; *Woods v. Farmere*, 7 Watts, 382; *Bates v. Norcross*, 14 Pick. 224; *George v. Wood*, 9 Allen, 80; *Crockett v. Maguire*, 10 Missouri, 34; *Tilton v. Hunter*, 24 Maine, 29; *Leiby v. Wolfe*, 10 Ohio, 80.

³ Amb. 436; 3 Atk. 646; 1 Ves. 64; 2 Lead. Cas. Eq. 35 (4th Eng. ed.).

⁴ See *Wyatt v. Barwell*, 19 Ves. 439; *Chadwick v. Turner*, 34 Beav. 634; L. R. 1 Ch. App. 310; *Neve v. Pennell*, 2 Hem. & M. 170; *Ford v. White*, 16 Beav. 120; *Benham v. Keane*, 1 Johns. & H. 685; 3 De G. F. & J. 318.

⁵ *Jackson v. Leek*, 19 Wend. 339; *Porter v. Cole*, 4 Maine, 20; *Rogers v. Jones*, 8 N. Hamp. 264; *Garwood v. Garwood*, 4 Halst. 193; *Hamilton v. Nutt*, 34 Conn. 501; *Owens v. Miller*, 29 Maryl. 144; *Farnsworth v. Childs*, 4 Mass. 637; *Martin v. Sale*, Bailey's Eq. 1; *Speer v. Evans*, 11 Wright (Pa.), 141; *Nice's Appeal*, 4 P. F. Sm. 200; *Pike v. Armstead*, 1 Dev. Eq. 110; *Van Meter v. McFaddin*, 8 B. Mon. 442; *Ohio Ins. Co. v. Ledyard*, 8 Alab. 866; *Gibbes v. Cobb*, 7 Rich. Eq. 34; American notes to *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 183.

⁶ *Wormald v. Maitland*, 35 L. J. Ch. (N. S.) 69; 13 Weekly Rep. 832; *In re Allen*, 1 Ir. R. Eq. 455. See, however, *Chadwick v. Turner*, L. R. 1 Ch. App. 310; *Agra Bank v. Barry*, 6 Ir. R. Eq. 128.

notice is enough ; and in Pennsylvania it is decided that open and notorious possession (which can operate only as constructive notice if the subsequent grantee is, in fact, ignorant of such possession) is sufficient notice of an unrecorded deed.¹ But even in these States the decisions upon this point have not been uniform ;² while in many other States of the Union a contrary doctrine has been held.³ It is, therefore, impossible to say that any uniform rule upon the subject exists on this side of the Atlantic.

In some States, as in Maine and Massachusetts, *actual* notice is required by statute.⁴

274. Before leaving the subject of notice it will be desirable to say a few words upon the doctrine of *lis pendens*, which may be conveniently adverted to in this connection, although, as will be seen presently, the doctrine is one which does not, strictly speaking, rest upon the general subject of notice.

The doctrine of *lis pendens* is one by which a suit in chancery duly prosecuted in good faith, and followed by a decree, is constructive notice, to every person who acquires from a defendant *pendente lite* an interest in the subject matter of the litigation, of the legal and equitable rights of the plaintiff, as charged in the bill and established by the decree.⁵ It is a doctrine of courts of equity of ancient origin ;⁶ and in this country is founded on Chancellor Kent's opinion, in *Murray v. Ballou*, decided in 1815.⁷ It is based upon the theory that legal proceedings during their

¹ *Tuttle v. Jackson*, 6 Wend. 213 ; *Price v. McDonald*, 1 Maryl. R. 414 ; *Krider v. Lafferty*, 1 Whart. 303 ; *Randall v. Silverthorn*, 4 Barr, 173 ; *Patton v. The Borough*, 4 Wright, 206 ; and in California, see *Mahoney v. Middleton*, 41 Cal. 41. Possession was also held to be notice in *Webster v. Maddox*, 6 Maine, 256 ; *Buck v. Holloway*, 2 J. J. Marsh. 178 ; *Hopkins v. Garrard*, 7 B. Mon. 312 ; *Colby v. Kenniston*, 4 N. Hamp. 262 ; *Morrison v. Kelly*, 22 Ill. 610 ; *Landes v. Brant*, 10 Howard, 348 ; *Talbert v. Singleton*, 42 Cal. 390.

² *Scott v. Gallagher*, 14 Serg. & R. 333 ; *Boggs v. Varner*, 6 Watts & Serg. 469 ; *Dey v. Dunham*, 2 Johns. Ch. 182 ; *Ohio Ins. Co. v. Ross*, 2 Maryl. Ch. Dec. 35 ; *Gill v. McAttee*, *Id.* 268.

³ *Harris v. Arnold*, 1 R. Island, 125 ; *Norcross v. Widgery*, 2 Mass. 509 ; *Bush v. Golden*, 17 Conn. 594 ; *Frothingham v. Stacker*, 11 Mis. 77 ; *Fleming v. Burgin*, 2 Ired. Eq. 584 ; *Flagg v. Mann*, 2 Sumn. 491.

⁴ See *Glass v. Hulbert*, 102 Mass. 34 ; *Boggs v. Anderson*, 50 Maine, 161 ; 2 Sug. V. and P. 545, note (8th Am. ed.).

⁵ *Haughwout v. Murphy*, 7 C. E. Green, 531, 544.

⁶ See *Sorrell v. Carpenter*, 2 P. Wms. 482 ; 2 Sug. V. and P. 533, note (8th Am. ed.).

⁷ 1 Johns. Ch. 566.

continuance are publicly known throughout the realm;¹ and while in some few cases in this country it has been rejected,² it has been very generally adopted throughout the United States, both in courts of law and in those of equity.³

The principal qualifications of this doctrine are that the specific property must be pointed out and sufficiently described by the proceedings; that it is notice only in relation to that property;⁴ and that it applies only to *purchasers* from a party to the suit of the thing in controversy, and has no application to a third person whose interest subsisted before the suit was commenced, but was of a contingent and conditional character.⁵

The doctrine of *lis pendens* had formerly been regarded as depending upon the general doctrine of notice; but in *Bellamy v. Sabine*,⁶ the subject was elaborately examined by the English court of appeals in chancery, and the conclusion reached that the true theory of *lis pendens* is that it proceeds from the general rule which forbids alienation of contested property pending litigation. The reason of the rule is the necessity for putting an end to litigation, which would become interminable if the subject matter thereof could be transferred, as often as the parties chose, from time to time. This view of the doctrine has been adopted in New Jersey.⁷

275. It has been already explained that the only persons who are entitled to avail themselves of want of notice as a defence are *bonâ fide* purchasers for a valuable consideration.

¹ Adams's Doct. of Eq. 157.

² *Newman v. Chapman*, 2 Rand. 93; *City Council v. Page*, Spear's Eq. 159. See *King v. Bill*, 28 Conn. 593.

³ *Murray v. Lylburn*, 2 Johns. Ch. 441; *Watlington v. Howley*, 1 Desaus. 167; *Owings v. Myers*, 3 Bibb, 279; *Wickliffe v. Breckenridge*, 1 Bush, 427; *Chaudron v. Magee*, 8 Alab. 570; *Tongue v. Morton*, 6 Har. & Johns. 21; *Green v. White*, 7 Blackf. 242; *Haven v. Adams*, 8 Allen, 363; *Baird v. Baird*, Phillips (Eq.) 317; *Edwards v. Banksmith*, 35 Georgia, 213; *Parsons v. Hoyt*, 24 Iowa, 154; *Scarlett v. Gorham*, 28 Ill. 319; *Jackson v. Warren*, 32 *Id.* 331;

Cooley v. Brayton, 16 Iowa, 10; *Hurlbutt v. Butenop*, 27 Cal. 50.

⁴ *Edmunds v. Crenshaw*, 1 McCord Ch. 252; *Lewis v. Mew*, 1 Strob. Eq. 180; *Green v. Slayter*, 4 Johns. Ch. 38; *Miller v. Sherry*, 2 Wallace, 237.

⁵ *Hopkins v. McLaren*, 4 Cowen, 678; *Clarkson v. Morgan*, 6 B. Mon. 441; *Parks v. Jackson*, 11 Wend. 442; *French v. The Loyal Company*, 5 Leigh, 627; *Diamond v. Lawrence County*, 1 Wright (Pa.), 356.

⁶ 1 De G. & J. 566.

⁷ *Haugwout v. Murphy*, 7 C. E. Green, 544. See, also, *Newman v. Chapman*, 2 Rand, 93, decided by the Court of Appeals in Virginia in 1823.

In other words, if a man wishes to hold property as against some other person who has a prior equitable right thereto, he must show that he is, in the first place, a *purchaser*, as distinguished from a mere *volunteer*; in the second place, that he is an *honest*, not a fraudulent purchaser; and lastly, that he has bought for a *valuable* consideration.

On the other hand, a purchaser who possesses these requisites is entitled to protect himself against any discovery in aid of the adverse claim. Ordinarily, as will be seen hereafter, a plaintiff in equity is entitled to discovery from the defendant—in other words, the latter must answer the bill of the former under oath. But to this general rule there are some exceptions, among them being this—that the defendant is not bound to disclose any imperfection in his title if he has honestly and in good faith paid for the estate in order to make himself the owner of it.

The principle of this plea was said by Lord Eldon to be this: “I have honestly and *bonâ fide* paid for this estate, in order to make myself the owner of it, and you shall have no information from me as to the perfection or imperfection of my title until you deliver me from the peril in which you state I have placed myself in the article of purchasing *bonâ fide*.”¹ Such a purchaser, when he has once put in that plea, may be interrogated and tested to any extent, as to the valuable consideration which he has given, in order to show the *bona fides* or *mala fides* of his purchase, and also the presence or absence of notice; but when once he has gone through that ordeal successfully, then the court has no jurisdiction whatever to do anything more than to let him depart in possession of the estate, right, or advantage which he has obtained, whatever that may be.² In the United States, generally, this position may be assumed by way of answer, instead of plea.

276. It is now settled in England, after some conflict of authority, that the plea of a *bonâ fide* purchaser for value is available for the protection of an equitable, as well as of a legal title;

¹ Wallayn v. Lee, 9 Ves. 24. See Sugden, V. and P., Chap. XXV., where the subject is discussed; Story's Eq. Pleading, § 603.

² Pilcher v. Rawlins, L. R. 7 Ch. App. 269; per Lord Justice James. See, also, Zollman v. Moore, 21 Grat. 329.

in other words, that it is not incumbent upon the party who desires to make use of this plea to get in the legal title.¹

In the United States there are several authorities that have adopted the rule that a holder of a mere equity cannot use this plea for his protection, apparently upon the ground that the purchaser of an equitable title takes it subject to all prior equities.² But it is respectfully submitted that this is a misapplication of that maxim; and it is to be presumed that the sounder modern English doctrine will in future be followed.³

A judgment creditor, and a creditor deriving title under levy of execution, are not *purchasers* in the sense of being entitled to avail themselves of this plea.⁴

277. Under the general doctrine of notice arises the rule that purchasers from a trustee for sale, must see to the application of the purchase-money. It is a general duty of trustees to use the trust property for the purposes of the trust alone; any other use of it is a breach of trust, and is unlawful.

It follows, that if trust property is sold, it must be sold for the benefit of the *cestui qui trust*; in other words, the sale must enure to his advantage, and the proceeds must be applied in accordance with the design of the trust. It follows, moreover, that a disposition of the property for any other consideration than one moving to the trust estate, is a fraud upon the trust; and that no person who acquires the trust property under such circumstances with notice of the trust, can claim to hold it free and discharged from the rights of the *cestui qui trust*.

Equity, for the protection of the interests of the *cestui qui*

¹ Colyer v. Finch, 5 H. L. Cas. 905, 288; Blake v. Heyward, 1 Bail. Eq. 208; where Williams v. Lambe, 3 Bro. C. C. Larrowe v. Beam, 10 Ohio, 498; Jenkins v. Bodley, 1 Sm. & M. Ch. 338; Wailes v. Cooper, 24 Miss. 208; Brown v. Wood, 6 Rich. Eq. 155.
284, were disapproved; and the rule in Wallayn v. Lee, 9 Ves. 24, and Joyce v. De Moleyns, 2 Jon. & Lat. 374, adopted.
See, also, Stackhouse v. The Countess of Jersey, 1 John. & H. 721; Att. Gen. v. Wilkins, 17 Beav. 285; Carter v. Carter, 8 K. & J. 917; Pilcher v. Rawlings, L. R. 7 Ch. App. 295; ante, p. 258, note 6.

² See Snelgrove v. Snelgrove, 4 Desaus.

³ See Flagg v. Mann, 2 Sumn. 486. See, also, upon this subject, Sug. V. and P., Ch. XXV., and the notes to Le Neve v. Le Neve, 2 Lead. Cas. Eq. 85.

⁴ Whitforth v. Guagain, 3 Hare, 416; Hart v. Farmers' Bank, 33 Verm. 252.

trust, has engrafted a still further doctrine—which is, that in order to prevent any fraud from being practised upon the rights of the beneficial owner, the purchaser from the trustee shall not hold the property freed from the trust, unless the purchase-money, after it is paid to the trustee, is duly appropriated by him to the purposes of the trust. This doctrine is known in equity as the duty on the part of the vendee of “seeing to the application of the purchase-money;” and it may be stated, very generally, in these terms, “that whenever the trust or charge is of a defined or limited nature, the purchaser must himself see that the purchase-money is applied to the proper discharge of the trust; but whenever the trust is of a general or uncertain nature, he need not see to it.”¹

Thus, where there was a trust of real estate to pay particular or scheduled debts, the purchaser was bound to see to the application of the purchase-money; if the trust was for the payment of debts generally, the purchaser was not so bound.

The reason of this distinction was, that the creator of the general trust must necessarily have intended that the receipt of the trustee should be a sufficient discharge, and that to him alone should be confided the duty and responsibility of a proper disposition of the trust assets. If the author of the trust *expressly* said in the instrument creating the same, that the receipt of the trustee would be sufficient, the purchaser was not bound to see to the application of the money; and it was considered that the same rule ought to apply when the power to give a sufficient discharge was implied.²

Sales of personal property by executors stand upon the same footing as sales of real estate under a trust to pay debts generally; the purchaser is not bound to see to the application of the money. Indeed, a purchaser of personalty was never bound, as a general rule, to see to the application.

278. Upon the principle stated above, a number of refinements and distinctions were engrafted by the English courts.

The doctrine was, however, a harsh one, and caused great in-

¹ See *Clyde v. Simpson*, 4 Ohio N. S. Sug. V. and P. 660, 661; *Elliott v. Mer-*
445; *Lewin on Trusts* (5th ed.), 33; *ryman*, 1 Lead. Cas. Eq. 45, and notes.

² *Lewin*, 332.

convenience; and it has, after one or two unsuccessful attempts, been finally abrogated in England by a statute passed in 1859.¹

279. In the United States, the doctrine never was received with any favor.² The distinction, between trusts for the payment of debts generally and the payment of scheduled debts, was not recognized; principally for the reason that lands in this country are, as a general rule, assets for the payment of debts; and that, therefore, where a general trust to pay debts attached to the whole realty, it brought the case within the rule applicable to trusts for the payment of debts generally. This tendency of the American courts not to adopt the doctrine of the necessity of seeing to the application of the purchase-money, has been further strengthened by legislation in some States.

It must be remarked, however, that even in the United States, a purchaser who *colludes* with an executor or trustee, will be held responsible for any misapplication of trust money growing out of the same transaction. But this falls under a different doctrine, viz., fraud.

¹ 22 & 23 Vic., c. 35, § 23.

² Perry on Trusts, § 797.

CHAPTER IV.

EQUITABLE ESTOPPEL; ELECTION.

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| <p>280. Definition of estoppel.</p> <p>281. Different kinds of estoppel; legal estoppels <i>in pais</i>.</p> <p>282. Equitable estoppel or estoppel by conduct; founded on fraud.</p> <p>283. A party may be estopped by the assertion of an untruth. <i>Congregation v. Williams</i>.</p> <p>284. A party may be estopped by the concealment of the truth. <i>Pickard v. Sears</i>.</p> <p>285. Conduct which works an estoppel must be external to the contract.</p> <p>286. Representations between party alleging estoppel and party estopped.</p> <p>287. Representations between party alleging estoppel and third party.</p> <p>288. Representations must be known to be false by party making them.</p> <p>289. Must operate to deceive the party to whom they are made.</p> <p>290. Intention that conduct should be acted on must exist.</p> <p>291. Estoppel must be actually produced by the conduct.</p> | <p>292. Estoppel is limited to the representations made.</p> <p>293. Estoppels in the cases of married women and infants.</p> <p>294. Estoppels bind parties and privies.</p> <p>295. Election; definition and example.</p> <p>296. Of two kinds; express and implied.</p> <p>297. Importance of the distinction between the two.</p> <p>298. Circumstances under which the doctrine of election arises; illustrations.</p> <p>299. After-acquired lands.</p> <p>300. Powers.</p> <p>301. Donor must give property of his own.</p> <p>302. Property of the donee must be also given.</p> <p>303. Gifts must be by the same instrument.</p> <p>304. Manner in which election may be made.</p> <p>305. Consequence of an election is compensation, not forfeiture.</p> <p>306. Application of doctrine of election to case of creditors.</p> |
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280. EQUITABLE estoppel is a doctrine of comparatively modern growth, but one, nevertheless, which has developed largely within the past few years, and which has received not a little consideration at the hands of judges and text writers.

An estoppel was defined by Lord Coke to be where "a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."¹ This definition, however, is rather striking than accurate. A man is not prevented, by estoppel, from

¹ Co. Litt. 352, a. The instance given is a comment, was where a man was by Littleton, upon which the remark cited estopped by his feoffment.

telling the truth. He is only barred from the assertion of a right or title by some previous action or conduct on his part, which would render the present assertion of his right unjust. Viewed in this light, estoppels are not odious suppressions of the truth, as they were considered to be in the old law; but are part of the machinery by which equitable conclusions are reached.¹

The correct view of an estoppel is that taken in a recent work, where, indeed, the whole subject has been learnedly and elaborately discussed.² "Certain admissions," it is there said, "are indisputable, and estoppel is the agency of the law by which evidence to controvert their truth is excluded."³ The law of estoppel, therefore, is a branch of the law of evidence, and it has become a part of the jurisdiction of chancery, simply because in equity alone, or rather by equitable construction alone, has that full effect been given to this species of evidence which is necessary to the due administration of justice.

281. Estoppels may arise either by matter of record, of deed, or *in pais*.⁴

It is only with estoppels of the latter class that we have anything to do—estoppels by record and by deed being common law estoppels, and not the peculiar province of chancery jurisdiction.

Indeed, some estoppels *in pais* are recognized and acted upon at common law. These are stated by Lord Coke to be estoppels by livery, by entry, by acceptance of rent, by partition, and by the acceptance of an estate.⁵ Of these the only two which prevail in America at the present day are estoppels by partition and by acceptance of rent.⁶ But these are not equitable estoppels, for they are quite well recognized at common law. We may, therefore, put aside from consideration any estoppels which existed in the time of Lord Coke.⁷

¹ "The office of estoppels at law is like that of injunctions in equity, to preclude rights which cannot be asserted consistently with good faith and justice, and to prevent wrongs, for which there might be no adequate remedy." Van Rensselaer v. Kearney, 11 How. 297. See, also, Doe v. Dowdall, 3 Houst. 377.

² Bigelow on Estoppel.

³ Bigelow on Estoppel, Introduction, XII.

⁴ See notes to the Duchess of Kingston's Case, 2 Sm. Lead. Cas. 617.

⁵ Co. Litt. 352, a.

⁶ Bigelow on Estoppel, 370.

⁷ *Id.*

Since Coke's time there has grown up a large class of estoppels *in pais*. Of these some may be considered legal estoppels (or those which are thoroughly recognized in courts of law), such as the estoppel which prevents a bailee from denying the title of the bailor, or the estoppel which displays itself in the warranty of genuineness implied by the acceptance and the endorsement of a bill of exchange or a promissory note;¹ and some, on the other hand, may be described to be purely equitable estoppels, or those estoppels which, although they may be recognized and acted upon in courts of law, nevertheless owe their origin and development to the ideas of justice entertained and promulgated by courts of chancery.² This particular class of estoppels *in pais* embraces what are known as estoppels by conduct; and this phrase may be, perhaps, used as the correlative term for equitable estoppels.³

282. Equitable estoppel, or estoppel by conduct, has its foundation in fraud considered in its most general sense; because a man cannot be prevented by his conduct from asserting a previous right, unless the assertion would be tantamount to a fraud upon a person who had subsequently acquired the right.⁴

Equitable estoppel might therefore have been noticed under the general head of Fraud;⁵ but it may properly receive a separate consideration, because in modern times this doctrine has assumed an importance which warrants its notice as a distinct head of Equitable Jurisdiction.

The representation which will operate as an estoppel must be one that is either a suggestion of falsehood, or a concealment of the truth when there is a duty to speak; it is always external to the transaction; and it may be a representation which takes place either in a transaction effected between the party alleging

¹ Bigelow on Estoppel, 427; 2 Sm. Lead. Cas. 658.

² The doctrine of estoppel *in pais* originated in chancery, but is now adopted in courts of law. Note to Duchess of Kingston's Case, 2 Smith's Lead. Cas. 711.

³ Horn v. Cole, 51 N. Hamp. 290; Bigelow on Estoppel, 370.

⁴ "The principle runs through the whole doctrine of estoppel that a man is

only prevented from alleging the truth when his assertion of a falsehood or his silence has been the inducement to action by the other party, which would result in loss if the opponent was permitted to gainsay what he had before asserted, or induced the other to believe by his acts."

Patterson v. Lytle, 1 Jones (Penna.), 66. See, also, Hill v. Epley, 7 Casey, 334.

⁵ Hill v. Epley, 7 Casey, 334.

the estoppel and the party estopped, or in one between the party alleging the estoppel and some third party.¹

283. The assertion of an untruth may operate to estop a party from subsequently setting up the truth. Thus a tenant, when a distress was levied on certain goods upon the premises, declared that the goods did not belong to him, and the distress was thereupon abandoned. Afterwards the landlord brought an action of ejectment upon a clause in the lease, authorizing a re-entry for non-payment of rent, in case sufficient distrainable goods were not found on the premises. In this action the tenant endeavored to show that the goods on the premises in point of fact were his; but it was held that he was estopped from so doing by his previous untruth.²

284. The concealment of the truth often operates as an estoppel. It has been forcibly said that if a man is silent when it is his duty to speak, he shall not be permitted to speak when it is his duty to be silent.³ Of this doctrine the case of *Pickard v. Sears*⁴ (which is the leading authority upon the general subject of estoppel by conduct) is an illustration. A mortgagee of personalty was there held to be estopped from asserting his title under the mortgage, because he had passively acquiesced in a purchase of the same by the defendant under an execution against the mortgagor. Another illustration may be found in the case which not unfrequently occurs, of a party being estopped from taking objections to the form of an instrument because he was silent as to those objections at the time of the tender. The instances of

¹ In *Bigelow on Estoppel* (480), it is said that the following elements must be present in order to an estoppel by conduct:—

1. There must have been a *representation* or *concealment* of material facts.

2. The representation must have been made with the *knowledge* of the facts.

3. The party to whom it was made must have been *ignorant of the truth* of the matter.

4. It must have been made with the *intention* that the other party should act upon it.

5. The other party must have been *induced to act upon it*.

Compare this statement with the requisites to a fraudulent misrepresentation *generally*, stated *ante*, page 207.

² *Congregation v. Williams*, 9 Wend. 147; 2 Smith Lead. Cas. 648. See, also, *Hefner v. Vandolah*, 57 Ill. 520; *Winchell v. Edwards*, *Id.* 41; *Leeper v. Hersman*, 58 *Id.* 218; *Horn v. Cole*, 51 N. Hamp. 287.

³ *Nivin v. Belknap*, 2 Johns. 573.

⁴ 6 Ad. & El. 469. See, also, *Winton v. Hart*, 39 Conn. 16; *Railroad Co. v. Du Bois*, 12 Wall. 47; *Chapman v. Chapman*, 9 P. F. Smith, 214.

estoppel by silence are quite numerous, and many of them may be found in the cases cited in the note.¹

But silence will not always work an estoppel, for a person is not bound, under all circumstances, to speak out.² He may not, for example, be bound to declare that which is a matter of record, and of which he has a right to presume the other party has notice.³

285. Estoppel by conduct must consist in something which is external to the contract or transaction. To explain: the obligor in a bond may have a good defence to any action on the instrument by reason of its having been obtained by fraud or duress. Such obligor might be estopped from setting up such a defence against an innocent assignee, if the assignment had taken place upon the faith of his assertion that no defence existed. That would be an estoppel, and it would arise out of something external to the contract. But if no such assertion had been made, but the assignee were simply to argue that the obligor of the bond was estopped by the recital contained in the bond that "he was justly indebted" from showing that in fact he was *not* justly indebted, such an argument would be unsound, because, in that case, the estoppel would be attempted to be founded upon something in the contract itself, and this cannot be done. The reason of this distinction is simply that if the very words of a contract are to be taken as a representation of facts, which estops the party who makes the obligation from interposing a defence inconsistent with that representation, then all contracts must be deemed valid which appear to be so on their face, and

¹ *Hope v. Lawrence*, 50 Barb. 258; *Co.*, 10 Wall. 589; *Silloway v. Neptune Blake v. Exchange Ins. Co.*, 12 Gray, Ins. Co., 12 Gray, 73; *Husted's Appeal*, 265; *Hoxie v. Home Ins. Co.*, 82 Conn. 34 Conn. 488; *Young v. Vough*, 8 C. E. 21; *Cambridge v. Littlefield*, 6 Cush. Green, 325.

210; *Ford v. Williams*, 24 N. York, 359; ² See *Corning v. Troy Factory*, 39 Barb. 311; 40 N. York, 191; *Shaw v. Gregg v. Von Phul*, 1 Wall. 274; *Hill v. Spencer*, 100 Mass. 382; *Watson v. Epley*, 7 Casey, 334; *Abrams v. Seale*, 44 Alab. 297; *Guthrie v. Quinn*, 43 *Id.* Knight, 44 Alab. 352; *Hopper v. Mc-561; Ives v. North Canaan*, 33 Conn. Whorter, 18 *Id.* 229; *Taylor v. Ely*, 402; *Smith v. Smith*, 30 *Id.* 111; 25 Conn. 250; *Spencer v. Carr*, 45 N. Y. Newell v. Nixon, 4 Wall. 572; *Weber v. 406; Elliott v. Ins. Co.*, 16 P. F. Sm. 26. Weatherby, 34 Maryl. 656; *Fletcher v. 3* *Rice v. Dewey*, 54 Barb. 455; *Bales Holmes*, 25 Ind. 458; *Stagg v. Insurance v. Perry*, 51 Missouri, 449.

neither usury, nor duress, nor fraud, could any longer be alleged in defence.¹

286. The representation which works an estoppel may sometimes take place in a transaction effected between the party alleging the estoppel and the party estopped. In other words, the parties to the transaction and the parties to the estoppel may be the same. Under this doctrine fall those cases in which a defence to a contract, which might otherwise have been taken, has been waived by the conduct of the party. Thus a common instance is found in the cases in which insurance companies have been held incapable of raising objections to the sufficiency of preliminary proofs of loss, because they have by their conduct dispensed with the requirements of their policies.²

287. On the other hand, the representations which give rise to an estoppel may occur in a transaction which takes place between the party alleging the estoppel and some third party; in other words, the parties to the transaction and to the estoppel may be different. This embraces by far the largest class of estoppels by conduct, and is a species of estoppel which receives its greatest encouragement in courts of equity, and, therefore, most strictly deserves the term of equitable estoppel. Under this head fall the case of *Pickard v. Sears*,³ cited above, and all those numerous cases in which a party is prevented from asserting his title, because, by active encouragement or equally effective silence, he has induced third parties to believe that no such title exists, and they have expended money, or in some way altered their position on the faith of such supposed non-existence.

Thus, it has been often held, that, where the owner of real estate encouraged another to erect valuable improvements upon the land, he was precluded from subsequently asserting his title.⁴ So, if the owner of an estate stand by and see another expend money upon an adjoining estate, the latter relying upon an existing right of easement in the other estate, without which

¹ *Clark v. Sisson*, 22 New York, 312; *Bigelow on Estoppel*, 480.

² *Blake v. Exchange Ins. Co.*, 12 Gray, 265; *Hoxie v. Home Ins. Co.*, 32 Conn. 21; *Bigelow on Estoppel*, 503.

³ 6 Ad. & El. 469.

⁴ *Leeds v. Amherst*, 2 Phillips, 117; *Favill v. Roberts*, 50 N. Y. 222; *Storrs v. Barker*, 6 Johns. (Ch.) 166; *Truesdail v. Ward*, 24 Mich. 134; *Smith v. McNeal*, 18 P. F. Sm. 164; *Browne v. Trustees of Baltimore Church*, 37 Maryl. 108, 124.

such expenditure would be useless, and do not interpose to prevent the work, he will not be permitted to interrupt the enjoyment of such easement.¹

288. In order to an estoppel the representation must be known to be false by the party making it, and it must be believed to be true by the party to whom it was made. If the party against whom an estoppel is alleged does not know the real facts of the case, but speaks and acts under a mistake, he cannot be prejudiced by his action, unless, indeed, his ignorance is due to his own gross negligence. On the other hand, the party alleging the estoppel must not have been acquainted with the facts, otherwise the action of the other party would not mislead him.

Of that branch of the above rule which relates to mistake on the part of the person against whom the estoppel is alleged, instances will be found in those cases in which the owners of land have allowed the owners of adjoining lots to build over the boundary line under a mistaken impression in regard to the extent of their own property. Such acquiescence in adverse user, short of the time required by the statute of limitations, will not deprive a party of his rights, because he is under no obligation to assert a title of the existence of which he is ignorant.² If, however, the mistake is the result of gross negligence, the conduct of the party who thus unintentionally, but negligently, misleads another, may preclude him.³

289. The party setting up the estoppel must actually be deceived by the conduct of the other party. If he acts with a full knowledge of the rights and title of the other party, he cannot complain if that title is subsequently asserted. There can be no fraud when all the parties interested are equally informed of all the facts and mutually assent to them.⁴

290. The party against whom an estoppel is alleged must

¹ *Brooks v. Curtis*, 4 Lans. (N. Y.) 283; Washburn on Easements, 62, 63.

² *Liverpool Wharf v. Prescott*, 7 Allen, 494; 4 Allen, 22; *Thayer v. Bacon*, 3 Allen, 163; *Brewer v. Boston and W. R. Co.*, 5 Met. 478; *Laverty v. Moore*, 33 N. Y. 658; *Raynor v. Timerson*, 51 Barb. 517; *Reed v. McCourt*, 41 N. Y. 435; *Rutherford v. Tracy*, 48 Missouri, 325; *Kincaid v. Dormey*, 51 *Id.* 552.

³ *Slim v. Croucher*, 1 De G. F. & J. 518; *Calhoun v. Richardson*, 30 Conn. 210; *Smith v. Newton*, 38 Ill. 230; *Stone v. Great Western Oil Co.*, 41 Ill. 85. See, also, *Swan v. North British Co.*, 7 Hurl. & N. 601; 2 Hurl. & C. 175.

⁴ *Rapalee v. Stewart*, 27 N. Y. 310; *Bales v. Perry*, 51 Missouri, 449.

intend that his conduct should be acted upon, although he may not have intended to deceive.¹

If there is no intention that the conduct should be an inducement to the action of others, there can be no estoppel by such conduct.² On the other hand, if there is an intention that the representation shall be relied upon by the other party, there will be an estoppel, although the representation may have been innocently made, and without an intention to deceive.³

The only exceptions to the rule as above stated appear to be the cases of *Cornish v. Abington*⁴ and *Manufacturers' Bank v. Hazard*;⁵ in which it was held that parties were estopped who had no intention whatever that their action should be relied upon by others. But these cases seem referable to the ground of negligence.

291. It is essential to an estoppel that it should be acted upon; that is to say, the conduct which is alleged to have produced an estoppel, must actually have been the inducing cause for the action of the party who seeks to set it up.⁶ This is illustrated by cases of dedication. If a man dedicates real estate to public use it is with the understanding that such dedication shall be accepted and acted upon by the public. If the public fail to act upon the dedication there can be no estoppel. If no such action has taken place, it will be considered that the offer of dedication has not been accepted, and that, therefore, no estoppel has ensued.⁷

Many other instances, also, may be found in the books which are illustrative of the same principle, viz., that an estoppel must be acted upon, or, in other words, that the party setting up the estoppel must have sustained actual damage.⁸

¹ *Freeman v. Cooke*, 2 Exch. 653; *In re Bahia and San Francisco R. R. Co.*, L. R. 3 Q. B. 584.

² *Holdane v. Cold Spring* 21 N. Y. 474; *Mayenborg v. Haynes*, 50 N. Y. 675; *Kuhl v. Mayor of Jersey City*, 8 C. E. Green, 84.

³ *In re Bahia and San Francisco R. R. Co.*, L. R. 3 Q. B. 584; *The Continental Nat. Bank v. The Nat. Bank of the Commonwealth*, 50 N. Y. 575.

⁴ 4 Hurl. & N. 549.

⁵ 30 N. Y. 226; *Bigelow on Estoppel*, 556, 557.

⁶ *State v. Laies*, 52 Missouri, 396; *Van Deusen v. Sweet*, 51 N. Y. 478.

⁷ *Baker v. Johnston*, 21 Mich. 319; *Hayne v. West Hoboken*, 8 C. E. Green, 354.

⁸ *Howard v. Hudson*, 2 El. & B. 1; *Stimson v. Farnham*, L. R. 7 Q. B. 175; *Hill v. Epley*, 7 Casey, 334; *Railroad Co. v. Dubois*, 12 Wal. 47. See, also, *Barker v. Binninger*, 14 N. Y. 270; *Malloney v. Horan*, 49 *Id.* 111; *Rivard v. Gardiner*, 39 Ill. 125; *Schmaltz v. Avery*, 16 Q. B. 655; *Helme v. Philadelphia Life Ins. Co.*, 11 P. F. Sm. 107.

292. It is important to consider to what extent, against whom, and in whose favor an estoppel may operate.

It is a sound and just rule that the estoppel will be limited to the representation made. Thus where a sheriff had a writ against A., but took B. into custody upon the false representation by B. that she was the party named in the writ, but detained her in custody after notice that she was not the party intended, it was held, that, although B. might be estopped from recovering damages for a false arrest, she would not be estopped from an action for the subsequent detention. The estoppel could not operate to justify the detention, for after notice that B. was not the real party the sheriff was no longer deceived by the representation.¹

293. It is sometimes difficult to determine whether estoppel by conduct will operate against married women and infants; and the cases on this subject are to a certain extent conflicting.² The true rule seems to be this: The contract of a person under disability cannot be made good by estoppel. Thus, if a married woman entered into an agreement (which, being made by a married woman, is void) for the sale of real estate, the circumstance that the purchaser went into possession under the contract, and made valuable improvements with the consent and encouragement of the *feme*, would not operate to estop the latter, because, as no remedy could possibly be had upon the void contract, it would be against the policy of the law to allow the same result to be reached through the indirect medium of an estoppel.³ Nor would the case of the purchaser be made any better if the woman had represented herself to be *sole*. Such a representation could amount to no more than a covenant that she was *sole*, and her coverture would render such a covenant, as well as all others, void.⁴

But while an estoppel could not have the effect of rendering a married woman's contract valid, it might, nevertheless, in the

¹ Dunston v. Paterson, 2 C. B. N. S. 495; Tilton v. Nelson, 27 Barb. 595; Bigelow on Estoppel, 496.

² Bigelow on Estoppel, 485.

³ Drury v. Foster, 2 Wal. 24; Lowell v. Daniels, 2 Gray, 161; Glidden v. Strupler, 2 P. F. Sm. 400; Morrison v.

Wilson, 13 Cal. 494; Rangeley v. Spring, 21 Maine, 130; Concord Bank v. Bellis, 10 Cush. 276; Miles v. Lingerian, 24 Ind. 385.

⁴ Liverpool Asstn. v. Fairhurst, 9 Ex. 422.

absence of any agreement, operate to prevent her from asserting a right. Thus, if a married woman were to encourage A. to buy property of B., knowing that the title was not in B., but in herself, she would be estopped from subsequently asserting her title against A., for in this case there would be no attempt to enforce a contract of the married woman either directly or indirectly, and, therefore, there would be no reason for not applying the ordinary doctrine of estoppel.¹

The same rule will apply to the conduct of an infant whereby he permits or encourages a purchaser to buy an estate of another. Under such circumstances the infant will be equitably estopped from asserting his right to the estate.²

294. An estoppel binds not only parties but privies.

Privies are of three kinds—of blood, of law, and in estate.³ The application of the doctrine that estoppels bind privies is more striking in the case of estoppels by record and by deed; but it may be said that the same general rules apply to estoppels by conduct, and that persons may be precluded from asserting rights by the speech, the silence, or the action of those as to whom they may have “mutual, or successive relationship to the same rights of property.”⁴

An estoppel cannot operate if the conduct of the party against whom an estoppel is alleged has been brought about by fraud.⁵

The doctrine of estoppel is frequently called into operation when a party is compelled to make an election between two inconsistent benefits, or between the assertion of two rights which ought not to be insisted on simultaneously.

Under such circumstances, the party having once elected is estopped from asserting the right which he has chosen to abandon.⁶

¹ *Connolly v. Branstler*, 3 Bush, 702; *Drake v. Glover*, 30 Alab. 382; *McCullough v. Wilson*, 9 Harris (Pa.), 486; *Brinkerhoff v. Brinkerhoff*, 8 C. E. Green, 477, 483.

² *Overton v. Banister*, 3 Hare, 503; *Esron v. Nicholas*, 1 De G. & S. 118; *Thompson v. Simpson*, 2 Jones & L. 110; *Stikeman v. Dawson*, 1 De G. & S. 90; *Wright v. Snowe*, 2 *Id.* 321; *Unity Asstn. v. King*, 3 De G. & J. 63; *Nelson v. Stocker*, 4 De G. & J. 458; *Hall v. Tim-*

mons, 2 Rich Eq. 120; *Whittington v. Wright*, 9 Ga. 23; *Bigelow on Estoppel*, 492, 493.

³ *Duchess of Kingston's Case*, 2 Sm. Lead. Cas. 658, and notes.

⁴ *Bigelow on Estoppel*, 75, 495; *Wood v. Seely*, 32 N. Y. 105; *Parker v. Crittenden*, 37 Conn. 148.

⁵ *Wilcox v. Howell*, 44 N. Y. 398; *Mallalieu v. Hodgson*, 16 Q. B. 689; *Bigelow on Estoppel*, 494.

⁶ *Bigelow on Estoppel*, 578.

295. An Election, in equity, is a choice which a party is compelled to make between the acceptance of a benefit under an instrument, and the retention of some property already his own, which is attempted to be disposed of in favor of a third party, by virtue of the same instrument. The doctrine rests upon the principle that a person claiming under an instrument shall not interfere by title paramount, to prevent another part of the same instrument from having effect according to its construction; he cannot accept and reject the same instrument.¹ It is a doctrine which is principally exhibited in cases of wills; but it has been applied, also, to cases of voluntary deeds, to cases of contracts for value resting upon articles, and to contracts completely executed by conveyance and assignment.²

The most common instance which is put of a case of an election, is where a testator gives money or land to A., and by the same will gives something of A.'s to B. Here A. must elect. He must either give effect to the will by allowing B. to have the property which the testator intended should go to him; or, if he chooses to disregard the will and retain his own property, he must make good the value of the gift to the disappointed beneficiary.³

296. Elections are said to be of two kinds, express or implied.⁴ An express election is where a condition is annexed to a gift, a compliance with which is distinctly made one of the terms upon which the gift can alone be enjoyed. Thus if a testator were to say, in so many words, that a legacy given by his will should only go to the legatee upon the stipulation that the latter should convey a piece of land, which was his own, to a third party; here would be an express condition, and the legatee would have to choose or elect between the legacy and the land. If he refused to convey the land, he would simply forfeit his legacy. But in the case stated in the preceding section, the duty to elect would not grow out of any express condition, but would be impliedly

¹ *Streatfield v. Streatfield*, 1 Lead. Cas. Eq. 333, and notes; *Codrington v. Lindsay*, L. R. 8 Ch. App. 578; *Stephens v. Stephens*, 3 Drew. 697, 701; *Hall v. Hall*, 1 Bland, 130; *Clay v. Hart*, 7 Dana, 1; *Brown v. Ricketts*, 3 John. Ch. 553; *Marriott v. Sam Badger*, 5 Maryl. 306; *Van Duyne v. Van Duyne*, 1 McCart. 49; *Gable v. Daub*, 4 Wright (Pa.), 217;

Reaves v. Garrett, 34 Alab. 558; *Brown v. Pitney*, 39 Ill. 468.

² *Codrington v. Lindsay*, L. R. 8 Ch. App. 587; *Anderson v. Abbott*, 23 Beav. 457; *Brown v. Brown*, L. R. 6 Eq. 481; *Willoughby v. Middleton*, 2 Johns. & H. 344.

³ *Glenn v. Clark*, 21 Grattan, 35.

⁴ *Hall v. Hall*, 2 McCord Ch. 269, 306.

annexed by the law, under the general principle that a man shall not be allowed to claim the benefit of any instrument unless he is willing to carry out all its provisions. And equitable election differs from the election growing out of an express condition in this, viz., that in express conditions the result of a non-compliance is a forfeiture; whereas in elections growing out of an implied duty, the person who declines to make good the gift in specie, does not absolutely lose the benefit which is bestowed upon him, but is compelled only to give up so much of it as will amount to compensation for the disappointed beneficiary.¹

297. The distinction between express and implied elections becomes of practical importance when the doctrine of election in equity is attempted to be applied to the case of void devises. For example: If a statute were to require that wills of real estate should be executed with certain formalities, and a testator were to make his will, not executed so as to pass real estate, whereby he should give a legacy to his heir upon the express condition that the latter would make good a devise of real estate to a stranger, it is obvious that the devisee of the real estate would take no good title from the testator because of the informality in the execution of the will, but the heir would nevertheless be obliged to release to the stranger, otherwise he would forfeit his claim to the legacy.²

But, on the other hand, if the bequest to the heir were not made on this *express* condition, then the mere fact that the realty was devised to a stranger would not put the heir to his election; because in the case supposed there would, in point of fact, have been no valid gift to the stranger, and there can be no election unless there are two gifts.³ The distinction, therefore, between

¹ *Gretton v. Haward*, 1 Swanst. 433. In his note to this case Mr. Swanston says that there are two propositions established by the authorities: 1st. That in the event of election to take against the instrument, courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints; and 2d. That the surplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right. See *post*, p. 289.

² *Nutt v. Nutt*, 1 Freem. Ch. 128.

³ See *Melchor v. Burger*, 1 Dev. & B.t. Eq. 634; *Snelgrove v. Snelgrove*, 4 Desaus. 274; *Jones v. Jones*, 8 Gill, 197.

elections which depend upon the expressed intention of the testator, and those which depend upon his *presumed* intention, is not unfrequently of practical importance.

The doctrine of election is applicable to remote and contingent interests as well as to those which are immediate and certain.¹

298. In order that the necessity for an election shall take place the testator must affect to dispose of property which is not his own,² and he must also make a valid gift of his own property. If both of these requisites do not occur there is no case for an election.

Two classes of cases have not unfrequently arisen by which both branches of this rule are illustrated.

The first of these arises when a widow, to whom a legacy has been given by her husband, claims dower out of the real estate devised. On the one hand, if the terms of the devise are such that they can only be satisfied by giving the devisee the land free from dower, the widow must, in this case, elect whether she will have her dower or the legacy.³ This is a plain case of election. The husband has no power to give away his wife's dower, and all devises must ordinarily be subject to her right. But if the widow wishes to have the legacy, she cannot claim a benefit under the will, without also being compelled to make good its provisions by which her dower in the realty is given to a stranger.

On the other hand, a mere devise of real estate to a stranger, and a legacy to the wife, will not put the latter to her election; for it may be very possible that the testator intended her to have a double benefit, and that the devise was designed to be subject to the burden of dower.⁴ Here is a case in which the testator cannot necessarily be said to have attempted to dispose of another's property, *i. e.*, his wife's dower; because *non constat* that he ever so designed to do. In such a case therefore there is

¹ Webb v. Shaftesbury, 7 Ves. 480; McQueen v. McQueen, 2 Jon. Eq. 16.

² See Box v. Barrett, L. R. 3 Eq. 244.

³ Butcher v. Kemp, 5 Mad. 61; Birmingham v. Kirwan, 2 Sch. & L. 444; Llewellyn v. Mackworth, Barnard. Ch. R. 445; Bacon v. Cosby, 4 De G. & Sm. 261.

⁴ Adsit v. Adsit, 2 Johns. Ch. 448;

Brown v. Caldwell, 1 Speer's Eq. 322.

See, also, Herbert v. Wren, 7 Cranch, 370; Lord v. Lord, 23 Conn. 327; Hall v. Hall, 8 Rich. (Law) 407; Norris v. Clark, 2 Stock. Ch. 51; 1 Lead. Cas. Eq. 410 (American notes).

no election. Between these two plain cases, however, a great many have arisen, where the discovery of the intention of the testator is exceedingly difficult.¹

The inquiry always is, however, did the testator intend to give away his wife's interest in the realty? If he did, then she must elect. If he did not, then there is nothing to prevent her from claiming her legacy under the will, and at the same time asserting her right to the dower, as against the devisee.²

299. Another class of cases is where there is a devise of after-acquired lands which do not pass by effect of the devise, but to the value of which the devisee may nevertheless become entitled by the doctrine of election. It is well known that by the English law a will, as to realty, spoke from its date, and did not, therefore, pass after-acquired lands. When, therefore, a testator devised lands, of which he afterwards became the owner, away from the heir, and by the same will gave the heir a benefit, a case for election arose.

The rule has by some authorities been supposed to be different. The case of a devise of after-acquired realty was supposed to fall under the same rule as a *void* devise, that is (for example), a devise by an infant, by a will not duly executed, or the like.³ But it has been justly pointed out that there is a distinction between a devise which is entirely void by reason of the incompetency of the party attempting to make it or by reason of the invalidity of the instrument, and a devise which simply fails because the subject matter is not capable of being disposed of by the testator. The latter falls clearly within the case of an attempt to dispose of property of which the testator is not the owner, and, therefore, presents a strict case of an election.⁴

It will be remembered that if the bequest to the heir is coupled with a direct stipulation that he shall give effect to a

¹ See *Lawrence v. Lawrence*, 2 Vern. 366.

² *Ellis v. Lewis*, 3 Hare, 310; *Pemberton v. Pemberton*, 29 Missouri, 408.

³ See *Hearle v. Greenbank*, 3 Atk. 695; 1 Ves., Sr. 298; *Rich v. Cockell*, 9 Ves. 369; *Sheddon v. Goodrich*, 8 Ves. 481.

⁴ *Schroder v. Schroder*, 1 Kay, 578; *Hance v. Truwhitt*, 2 Johns. & H. 216;

American note to *Streatfield v. Streatfield*, 1 Lead. Cas. Eq. 407 (where the opinion of the court in the City of Philadelphia *v. Davis*, 1 Whart. 490, is criticised); *McElfresh v. Schley*, 2 Gill, 181; *Kearney v. MacComb*, 1 C. E. Green, 189; *Maxwell v. Maxwell*, 2 De G. M. & G. 705. See *Orrell v. Orell*, L. R. 6 Ch. 303.

devise of after-acquired land, it will fall under the head of express conditions, and will be enforced under the doctrine of forfeiture, and not under that of equitable election, as was stated above.

300. Another case of election sometimes arises under powers. If, for example, A. has a power of appointment in favor of B., and in default thereof the property is limited to C., and A. exercises the power in favor of D., and by the same instrument gives a benefit to C., the latter must be put to his election. If he claims under the instrument, he must give effect to the defective execution of the power. If he claims adversely to the instrument, he must compensate the disappointed appointee out of the benefit which the instrument confers upon him.¹

So, also, if there is a power to appoint to two, and the donee of the power appoints to one only, and gives a legacy to the other, he cannot claim the legacy and also dispute the validity of the appointment.² But where a testatrix made an appointment under a power in favor of her son, which partially failed for remoteness, and made a general residuary appointment under the power to her daughters, to whom certain other benefits were also given; it was held that the daughters might claim the benefit of the appointment which had failed, without being put to their election in regard to their legacies.³ The reason of this decision was, that the daughters claimed the benefit of the appointment which had failed, not as persons who took in default of a proper execution of the power, but under the general residuary appointment; in other words, they claimed this fund, as well as the legacy, under the will, and not by any title adverse to the will; hence there was no room for the doctrine of election. The rule as to election is to be applied only as between a gift under a will and a claim *dehors* the will and adverse to it, and is not to be applied as between one clause in a will and

¹ 2 Sug. Pow. 148; note to *Streatfield v. Streatfield*, 1 Lead. Cas. Eq. 351; *Whistler v. Webster*, 2 Ves., Jr. 267; *Coutts v. Ackworth*, L. R. 9 Eq. 519. See, also, *Blacket v. Lamb*, 14 Beav. 482; and the criticism in Snell's Eq. 174.

Woolridge v. Woolridge, Johnson, 63; *Churchill v. Churchill*, L. R. 5 Eq. 44; 2 Spence, 520; 2 Sug. Pow. 148.

² *Wollaston v. King*, L. R. 8 Eq. 165. See *Wallinger v. Wallinger*, L. R. 9 Eq. 301.

³ *In re Fowler's Trust*, 27 Beav. 362;

another clause in the same will.¹ Where a person appoints to the object of the power, and gives him a legacy, and then directs him to settle the appointed property on persons who are not the objects of the power, a case of election is not raised, unless there is a clause of forfeiture on non-compliance with the directions.²

301. It was stated above, that one of the two requisites necessary to give rise to a case of election was that the donor should give property of his own.

This may, also, be illustrated by a reference to the execution of powers. If A. has a power of appointment among B., C., and D., in default of the due execution of which B. is entitled to take; and A. exercises the power validly as to B., but invalidly as to C. and D.; B. is, nevertheless, entitled to make good his claim in default of the proper execution; because the benefit that he receives by virtue of the appointment is not a benefit fed (so to speak) out of property belonging to A., but is derived from that in which A. has no ownership, but only a power of appointment.³

302. Nor will a person be compelled to elect unless *his* property is attempted to be disposed of by the testator. Thus, where a testator assumed to dispose of the *whole* of a fund by virtue of a power in a settlement, and appointed a moiety thereof to C., and the other moiety to S., whose wife was in fact entitled to a moiety under the settlement, and S.'s wife subsequently died, and S. administered upon her estate, it was held that there was no case for an election, because the gift, under the will, was to him in his own right, and his claim adversely to the will was as the representative of his wife; in other words, *his* property was not attempted to be disposed of by the gift to C.⁴

303. The doctrine of election only obtains in those cases in which the twofold gift is made by the same instrument. If, therefore, a benefit is conferred by deed upon a person whose property the donor afterwards affects to dispose of by will, this is no case

¹ Per James, V. C., in *Wollaston v. King*, L. R. 8 Eq. 174.

² *King v. King*, 15 Irish Ch. 479, overruling *Moriarty v. Martin*, 3 Irish Ch. R. 26.

³ *Bristow v. Warde*, 2 Ves., Jr. 336; *In re Fowler's Trust*, 27 Beav. 362.

⁴ *Grissell v. Swinhoe*, L. R. 7 Eq. 291. See *Cooper v. Cooper*, L. R. 6 Ch. App. 21, and *Wilkinson v. Dent*, *Id.* 339.

of election, because the donee is not called upon to attack and defend, at one breath, the same instrument.

Evidence *dehors* the instrument is not admissible.¹

It is immaterial whether the testator knew that the property was not his own, or conceived it to be his own. The doctrine of election will exist in either case.² Cases of no little difficulty, however, sometimes arise where a testator assumes to deal with property in which he has but a limited interest. Where he has any interest at all, the leaning of the courts is towards a construction which would make him deal only with that to which he is entitled, and not with that over which he had no disposing power, inasmuch as every testator must *primâ facie* be taken "to have intended to dispose only of what he had power to dispose of, and in order to raise a case of election, it must be clear that there was an intention on the part of the testator to dispose of what he had not the right or power to dispose of."³ Moreover, it may be stated generally that the intention to raise an election must be a clear one; for a party will never be put to his election upon a doubtful construction.⁴

304. As to the manner in which an election may be made, it may be either by some decisive act by which the party may be at once estopped from afterwards setting up any title adverse to the disposition to which he has thus given effect,⁵ or by some silent acquiescence in the changed condition of things upon the faith of which other parties have acted and acquired rights which it would be inequitable afterwards to disturb.⁶ But a

¹ Clementson v. Gandy, 1 Keen, 309; Stratton v. Best, 1 Ves., Jr. 285; Honeywood v. Forster, 30 Beav. 14; City of Philadelphia v. Davis, 1 Whart. 490; Timberlake v. Parish, 5 Dana, 345; Miller v. Springer, 20 P. F. Sm. 273; McGinnis v. McGinnis, 1 Kelly, 496. See, however, Long v. Wier, 2 Rich. Eq. 283.

² Whistler v. Webster, 2 Ves., Jr. 367; Stephens v. Stephens, 1 De G. & J. 62.

³ Wintour v. Clifton, 8 De G. M. & G. 641; Shuttleworth v. Greaves, 4 My. & Cr. 35; Dummer v. Pitcher, 2 My. & Keen, 262. See Wilkinson v. Dent, L. R. 6 Ch. App. 339.

⁴ Wilson v. Army, 1 Dev. & Bat. Eq.

376; Hall v. Hall, 1 Bland, 130; McElfresh v. Schley, 2 Gill, 182; Havens v. Sackett, 5 N. Y. 365. See, also, Blaket v. Lamb, 14 Beav. 482; where the court refused to raise an election from mere precatory words which, in that case, were construed not to be imperative.

⁵ See Snell's Principles of Equity, 182.

⁶ Tibbits v. Tibbits, 19 Ves. 656; Worthington v. Wiginton, 20 Beav. 67. See Spread v. Morgan, 11 H. L. Cas. 588; Fulton v. Moore, 1 Casey, 468; Upshaw v. Upshaw, 2 Hen. & Munf. 381; Caston v. Caston, 2 Rich. Eq. 1; Stark v. Hunton, Saxt. Ch. 216, 227; Clay v. Hart, 7 Dana, 1.

bare acquiescence, without a deliberate and intelligent choice made under a full knowledge of all the circumstances, and of the party's rights, will not be an election.¹

If the fact of election is doubtful, it may be sent to a jury for determination.²

Parties competent to make an election must usually be *sui juris*, but elections may sometimes be made by a court of equity on behalf of infants and married women.³

A party compelled to elect is entitled to know the value of the properties previous to election;⁴ and may file a bill to have all necessary accounts taken.⁵

305. It was at one time doubted whether the consequences of an election, adverse to the will of the donor, were to be measured by the theory of forfeiture, or by that of compensation; that is to say, whether the gift was absolutely forfeited by the refractory donee for the benefit of the disappointed beneficiary, or whether the donee was only obliged to make good the other gift to the extent of its value.

The law is now settled in favor of the doctrine of compensation.⁶

306. It was said by Sir Wm. Grant, in *Kidney v. Coussmaker*,⁷ that the doctrine of election did not apply in the case of a creditor. This *dictum* is true enough if confined only to those cases in which property is charged by will with debts; for in such a case the creditor may claim the benefit of the charge, and still seek satisfaction of his debt out of other assets. But the rule is, nevertheless, not of universal application; for it has been decided that where a creditor decisively acquiesces in a certain disposition of the debtor's property, he will not be allowed to

¹ *Duncan v. Duncan*, 2 Yeates, 302; *Snelgrove v. Snelgrove*, 4 Desaus. 274; 1 Lead. Cas. Eq. 419 (Am. note).

² *Roundel v. Currer*, 2 Bro. C. C. 67; 1 Swanst. 383, n.

³ *Davis v. Page*, 9 Ves. 350; *Barrow v. Barrow*, 4 K. & J. 409; *Willoughby v. Middleton*, 2 J. & H. 344; *Addison v. Bowie*, 2 Bland, 606; *Streatfield v. Streatfield*, Cas. Temp. Talbot, 176; 1 Lead. Cas. Eq. 333.

⁴ *Boynton v. Boynton*, 1 Bro. C. C. 445; *Buttricke v. Brodhurst*, 8 Bro. C. C. 88; *Kreiser's Appeal*, 19 P. F. Sm. 200. See, however, *Douglas v. Douglas*, L. R. 12 Eq. 637.

⁵ *Buttricke v. Brodhurst*, 8 Bro. C. C. 88; 1 Ves., Jr. 171.

⁶ *Spread v. Morgan*, 11 H. L. Cas. 588; *Key v. Griffin*, 1 Rich. Eq. 67; *Stump v. Findlay*, 2 Rawle, 174.

⁷ 12 Ves. 136.

enforce the collection of his debt by proceedings by which that disposition may be violated. Thus, if a creditor accepts a dividend under an assignment for the benefit of creditors, he will not afterwards be allowed to avoid that assignment in order to render the assets covered thereby liable to execution for his debt.¹

CHAPTER V.

CONVERSION AND RECONVERSION.

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| <p>307. General nature and extent of equitable conversion.</p> <p>308. Example. <i>Fletcher v. Ashburner</i>.</p> <p>309. Conversion may take place either under a trust or under a contract.</p> <p>310. What language is necessary to effect a conversion.</p> <p>311. In what ways a trust to convert may be made imperative.</p> <p>312. Question of conversion one of intention.</p> <p>313. Contract, to work a conversion, must be binding.</p> <p>314. General results of a conversion; qualifications.</p> <p>315. Failure of the purposes of a conversion; resulting trust.</p> | <p>316. <i>Ackroyd v. Smithson</i>; <i>Smith v. Claxton</i>.</p> <p>317. Conversions "out and out."</p> <p>318. Doctrine in the United States on this subject.</p> <p>319. Conversion under instruments <i>inter vivos</i>.</p> <p>320. Time from which a conversion takes place.</p> <p>321. Conversion under optional contracts.</p> <p>322. Reconversion may be by act of party or by act of law.</p> <p>323. Election to reconvert may be either by express declaration, or by acts.</p> <p>324. By whom such election may be made.</p> <p>325. Reconversion by operation of law.</p> |
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307. By Equitable Conversion is meant a change of property from real into personal, or from personal into real, not actually taking place, but presumed to exist only by construction or intendment of equity. "Nothing" (it has been said) "is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given, whether by will or by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to

¹ *Adlum v. Yard*, 1 Rawle, 163; *Perry on Trusts*, § 596.

be paid, whether the land is actually conveyed or only agreed to be conveyed, the owner of the fund, or the contracting parties may make land money or money land."¹ By this and similar declarations, the judges do not mean to assert a solemn piece of legal juggling without any foundation of common sense; but simply to lay down the practical doctrine that for certain purposes of devolution and transfer, and in order that the rights of parties may be enforced and preserved, it is sometimes necessary to regard property as subject to the rules applicable to it in its changed and not in its original state, although the change may not have actually taken place.

308. The case just cited² is an excellent illustration of the general nature of this doctrine. There F. made his will, by which he devised real estate to trustees in trust (after his widow's death), to sell the same and divide the proceeds between his son and daughter. The son and daughter both died in the lifetime of the widow, who, as her son's next of kin, became entitled to the property if it were to be considered as personalty. After her death a bill was filed by the son's heir-at-law, claiming the property as real estate. It will be observed that the question then fairly arose whether the devolution of the property, after the death of the original testator, was to be governed by the rules which were applicable to it in its existing condition as realty, or by the rules which would control it in the condition into which it was directed to be changed—viz., personalty; in the former case it would go to the son's heir; in the latter, to the personal representative of the widow. The question was decided in favor of the personal representative of the widow, upon the theory (already quoted) stated by the Master of the Rolls.

¹ By Sir Thomas Sewell, M. R., in *Fletcher v. Ashburner*, 1 Bro. C. C. 497. This is the leading authority on this subject. See 1 Lead. Cas. Eq. 619. See, also, *Craig v. Leslie*, 3 Wheat. 563; *Peter v. Beverly*, 10 Peters, 532; *Taylor v. Benham*, 5 How. 233; *Lorillard v. Coster*, 5 Paige Ch. 172; *Kane v. Gott*, 24 Wend. 641; *Allison v. Wilson*, 13 Serg. & R. 330; *Morrow v. Brenizer*, 2 Rawle, 185; *Burr v. Sim*, 1 Whart. 252; *Parkinson's Appeal*, 8 Casey, 455; *Brolasky v. Gally's Exrs.*, 1 P. F. Smith, 509; *Tazewell v. Smith*, 1 Rand. 313; *Pratt v. Taliaferro*, 3 Leigh, 419; *Smith v. McCrary*, 3 Ired. Eq. 204; *Ex parte McBee*, 63 N. Carolina, 332; *Tayloe v. Johnson*, *Id.* 381; *Scudder v. Vanarsdale*, 2 Beas. 109; *Thomas v. Wood*, 1 Maryl. Ch. 296; *Lynn v. Gephart*, 27 Maryl. 563; *Collins v. Champ's Heirs*, 15 B. Mon. 118; *Green v. Johnsen*, 4 Bush, 167; *Rinehart v. Harrison*, Baldw. C. C. 177.

² *Fletcher v. Ashburner* (*supra*).

309. Conversion may arise not only under a trust (of which an illustration has just been given), but also under settlements and other instruments *inter vivos*. Where (for example) a binding contract is made for the sale of land, from that instant a conversion takes place.¹ The purchaser is regarded for many purposes as the owner of the land, and the rights of parties claiming under him are determined by the rules which govern the devolution of realty. If the purchaser dies before conveyance, his heir will take the land, and the executor will be obliged to pay the purchase-money.²

310. Bearing in mind the twofold manner (by trust and by contract) by which conversion may take place, the next points for consideration are, first, what language is necessary to effect a conversion; secondly, the general effects of the conversion; and thirdly, the time from which the conversion takes place.³

As to the first point, it may be stated, in general terms, that in order to effect a conversion the direction to convert in a trust must be couched in imperative language, and that in a contract the agreement must be binding.

The general rule that the duty to convert must be imperative, and not left to the mere option of the executors or trustees, has been recognized and enforced in many cases both in England and in this country. Thus a conveyance to trustees to pay an annuity out of the rents of certain real estate, or to sell, was held not to work a conversion, because it was not imperative on the trustees to exercise the power.⁴ Many other authorities to the same effect are to be found.⁵

311. This imperative character may be impressed upon the trust in at least two well recognized ways: either, first, by the

¹ Sugden, V. and P. 175.

² See *Att. Gen. v. Brunning*, 8 H. L. Cas. 243; *Griffith v. Beecher*, 10 Barb. 432; *Rose v. Jessup*, 7 Harris (Pa.), 280; *Naglee v. Ingersoll*, 7 Barr, 185. The rights of the creditors of the vendor are not affected by the conversion. *Leiper's Exrs. v. Irvine*, 2 Casey, 54. See *Leiper's Appeal*, 11 Casey, 420.

³ See *Snell's Principles of Equity*, 140.

⁴ *Bleight v. The Bank*, 10 Barr, 131.

⁵ See *Curling v. May*, cited 3 Atk.

255; *In re Ibbitson*, L. R. 7 Eq. 226; *Bourne v. Bourne*, 2 Hare, 35; *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 548; *Greenway v. Greenway*, 2 De G. F. & J. 128; *Dominick v. Michael*, 4 Sandf. S. C. 374; *Pratt v. Taliaferro*, 3 Leigh. 419; *Montgomery v. Milliken*, 1 Sm. & Marsh. Ch. 495; *Cook v. Cook*, 5 C. E. Green, 375; *Anewalt's Appeal*, 6 Wright (Pa.), 414; *Chew v. Nicklin*, 9 *Id.* 84; *Phelps' Exer. v. Pond*, 23 N. Y. 69.

use of direct words of command, or, secondly, by a disposition of the property on such limitations as necessitate a change.

If a testator devises land to be sold, or orders or directs that the same shall be sold, it is obvious that it is the imperative duty of the trustees to make the sale. They have no discretion in the matter. They are simply to turn the real estate into personalty, and to apply the money thus realized to the purpose designated in the will. This is the plainest case of conversion.

Another case, almost as plain, is where the testator has not imperatively ordered a sale, but has given a power to convert coupled with such directions as to the ulterior settlement of the property in its changed condition, as to render it impossible to carry out the will without making the conversion. Thus, if a man were to give a power to trustees to invest money in land, and were to prescribe such subsequent limitations as could only be carried out if the subject matter were realty, a conversion must necessarily be intended, otherwise the limitations would fail.¹

312. The doctrine of conversion is not confined to those testamentary dispositions only in which imperative words are used or wherein limitations, which can only be effectuated by a conversion, exist. It is to be applied to all those cases in which a general intention of the testator is sufficiently manifested to give the property to the donee in a condition different from that in which it exists at the time when the will goes into effect.² The question always is, did the testator intend to give money or to give land, and has that intention been sufficiently expressed. Once arrive at the intention, by proper rules of interpretation, and the property will then be considered as impressed with that character which the testator designed it should bear when it

¹ *Earlom v. Saunders*, Ambler, 241. See *Atwell v. Atwell*, L. R. 13 Eq. 23; also the opinion of Lord Cottenham in *Cookson v. Cookson*, 12 Cl. & Fin. 145.

² See Snell's Principles of Equity, 142; *Bogert v. Hertell*, 4 Hill, 492; *Smith v. Tazewell*, 1 Randolph, 313; *Stagg v. Johnson*, 1 Comstock, 206; *Cowley v. Hartsonge*, 1 Dow. 361; *Cookson v. Reay*,

5 Beav. 22; 12 Cl. & Fin. 120; *Grieverson v. Kirsopp*, 2 Keen, 658; *Cornick v. Pearce*, 7 Hare, 477; *Mower v. Orr*, *Id.* 473; *Greenway v. Greenway*, 1 Giff. 181. It is the *duty* to convert which creates the equitable change; *Thornton v. Hawley*, 10 Ves. 129; *Taylor v. Taylor*, 3 De G. M. & G. 190; *Robinson v. The Governors*, 10 Hare, 19.

reached the hands of the beneficiary.¹ While a discretion in the trustees, as to whether a sale shall or shall not take place, will of course prevent a conversion, yet a mere discretion as to the *time* or manner of sale will not hinder a conversion.²

313. As, where the conversion arises under a trust, imperative words (or equivalent provisions) are required to create it; so, also, where the conversion is claimed to have taken place by virtue of a *contract*, it is necessary, as a general rule, that the contract be binding. The question always is, whether the vendor or purchaser (as the case might be) at the time of his death was either absolutely or contingently under such an agreement as equity would enforce against him.³ The rule is not altered by anything happening after the death of the purchaser by which the binding character of the contract could be affected,⁴ nor by the circumstance that the purchase is entirely at the option of the vendee.⁵

314. The next subject for consideration is the general effects or results of the conversion. Generally speaking, the court carries out the principle of conversion in all its consequences.⁶ Thus money directed to be turned into land descends to the heir; and land directed to be converted into money goes to personal representatives;⁷ money belonging to a married woman which is directed to be converted into land is liable to the husband's curtesy;⁸ an alien, though incapable of taking land for his own benefit, can take the proceeds of land directed to be

¹ *Morrow v. Brenizer*, 2 Rawle, 185; *Wurts v. Page*, 4 C. E. Green, 365.

² *Stagg v. Jackson*, 1 Comstock, 206; *Tazewell v. Smith*, 1 Rand. 813. See, however, *Christler v. Meddis*, 6 B. Monr. 35.

³ *Dart on Vendors*, 238 (4th ed.); *Garnett v. Acton*, 28 Beav. 333; 1 Lead. Cas. Eq. 843; note to *Fletcher v. Ashburner*. See, however, the case of *Frayne v. Taylor*, 33 L. J. Ch. (N. S.) 228, where an heir of a vendor elected to carry out the parol contract of his ancestor, and it was held that a conversion had taken place, and that the proceeds should go to the personal estate of the ancestor.

⁴ *Dart on Vendors*, 246; 1 Lead. Cas. Eq. 843; *Hudson v. Cook*, L. R. 13 Eq. 417.

⁵ *Dart on Vendors*, 230; *Collingwood v. Row*, 3 Jur. N. S. 735; *Kerr v. Day*, 2 Harris (Penna.), 114; *Lawes v. Bennett*, 1 Cox, 167.

⁶ 2 Spence Eq. 264.

⁷ *Snell's Principles of Equity*, 148; *Scudamore v. Scudamore*, Prec. Ch. 543; *Ashby v. Palmer*, 1 Mer. 296; *Elliott v. Fisher*, 12 Sim. 505; *Wurts v. Page*, 4 C. E. Green, 365.

⁸ *Sweetapple v. Bindon*, 2 Vern. 536.

sold;¹ and in many other cases the enjoyment of property will be determined by the rules applicable to it in its changed, and not its original state.²

But it must not be supposed that for *all* purposes the property is to be treated as in its converted state. The notional conversion is not equivalent to a real conversion. Thus in *Franks v. Bollans*³ it was held that where there was a notional conversion of realty into personalty, the husband of a woman beneficially entitled could not dispose of his wife's interest by the same means by which he could dispose of her actual personal property; and in *Brook v. Badley*⁴ it was held that the interest of a person entitled to a portion of the proceeds of land directed to be sold was to be considered as realty, so far as his capacity to make a valid gift to a charity was concerned. "The estate," said Cairns, L. J., in the case last cited, "is in the hands of the trustees, not for the benefit of those trustees, but for the benefit of the four persons between whom the proceeds of the estate are to be divided when the sale takes place. It may very well be that no one of these four persons could insist upon entering on the land, or taking the land, or enjoying the land *quâ* land; and it may very well be that the only method for each one of them to make his enjoyment of the land productive, is by coming to the court and applying to have the sale carried into execution; but, nevertheless, the interest of each one of them is, in my opinion, an interest in the land, and it would be right to say in equity that the land does not belong to the trustees, but to the four persons between whom the proceeds are to be divided."⁵

¹ *Craig v. Leslie*, 3 Wheat. 563; *Du Hourmelin v. Sheldon*, 1 Beav. 79; 4 My. & Cr. 525.

² See *Earlom v. Saunders*, Ambl. 241.

³ L. R. 3 Ch. App. 718. In *Oldham v. Hughes*, 2 Atk. 452, Lord Hardwicke, in speaking of the power of a *feme covert* to bind money, articed to be laid out in land, by her consent in court, with the same effect as she could the land itself by a fine at law, remarked that "at law money so articed to be laid out in land is considered barely as money until an actual investiture, and the equity of this

court alone views it in the light of a real estate; and, therefore, this court can act upon its own creature, and do what a fine at common law can upon land;" which shows that the doctrine of conversion in equity is purely notional, and that the property is to be treated, as if in its changed condition, only for certain purposes. See, however, *Siter v. McClanahan*, 2 Grat. 280.

⁴ L. R. 3 Ch. App. 674. See, also, *De Lancey v. Reg.*, L. R. 7 Ex. 140.

⁵ *Brook v. Badley*, L. R. 3 Ch. App. 674.

315. Another very important qualification of the general effect of a conversion is that the conversion is limited to the purpose of the donor; and that, therefore, in the event of a failure of the purpose, the property will devolve according to its original character.

When the purpose of the conversion totally fails, the rule is quite simple. Where a conversion is directed or contracted, whether by will, or by settlement or other instrument *inter vivos*, whether of money into land, or of land into money, if the objects and purposes of that conversion have totally failed before the instrument directing the conversion comes into operation, no conversion will take place; but the property so directed or contracted to be converted will remain in its original state, or rather, will result to the testator or settlor with its original form unchanged.² Vice-Chancellor Wood, in speaking of the conveyance in *Clarke v. Franklin*,³ said: "So here, if, at the moment when the grantor put his hand to this deed, the purpose for which conversion was directed had failed—for instance, if he had given all the proceeds instead of a part to charitable purposes, so that the property would have been *at home* in his lifetime—the court would have regarded it as if no conversion had been directed, and the property would have resulted to the grantor as real estate."

Turning now to cases of a *partial* failure of the objects of the conversion, the questions become, perhaps, a little more difficult and complicated. Taking into consideration, in the first place, conversions by wills, the general rule as to the case of land converted into personalty would seem to be, that where there is a partial failure, the undisposed of surplus will result to the *heir*; and, moreover, that where it is necessary to sell the land for the purposes of the trust, the surplus belongs to the heir as *money* and not as land, and will therefore go to his personal representatives, even though the land may not have been sold during his lifetime.⁴

¹ See Hill on Trustees, 127, 128, and notes; *Smith v. McCrary*, 3 Ired. Eq. 204; *Commonwealth v. Martin*, 5 Munf. 117; *Morrow v. Brenizer*, 2 Rawle, 185; *Slocum v. Slocum*, 4 Edw. Ch. 613.

² Snell's Principles of Equity, 149.

³ 4 K. & J. 257. See, also, *Smith v. Claxton*, 4 Mad. 492.

⁴ *Ackroyd v. Smithson*, 1 Bro. C. C. 503; *Smith v. Claxton*, 4 Mad. 492; *Wright v. Wright*, 16 Ves. 188; *Wall v. Colshead*, 2 De G. & J. 688; Snell's Prin.

316. The leading authority upon the general proposition, that where there is a partial failure there will be a resulting trust for the *heir* and not for the *personal representatives* of the testator, is *Ackroyd v. Smithson*, well known for the celebrated argument of Lord Eldon, then Mr. Scott, who was counsel in the case;¹ while the *character* in which the property goes to the heir is well explained in *Smith v. Claxton*.²

“Where a devisor” (it was there said) “directs his land to be sold, and the produce divided between A. and B., the obvious purpose of the testator is that there shall be a sale for the convenience of division, and A. and B. take their several interests as money and not land. So if A. dies in the lifetime of the devisor, and the heir stands in his place, the purpose of the devisor that there shall be a sale for the convenience of division still applies, and the heir will take the share of A., as A. would have taken it as money and not land. But suppose A. and B. both to die in the lifetime of the devisor, and the whole interest in the land descends to the heir; the question would then be whether the devisor can be considered as having expressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money. The obvious purpose of the devisor being that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devise wholly failed, and the heir would, therefore, take the whole interest as land.”

Passing now to the case of money directed to be laid out in land, the rule is that (following *Ackroyd v. Smithson*) the surplus occasioned by a partial failure will result to the personal representatives of the testator,³ but that (departing from *Smith v. Claxton*) the personal representatives will take it in its original form of personalty, and not in its converted form of realty.⁴ The reason for applying the principle of *Ackroyd v. Smithson* to the cases of conversion from personalty into realty is obvious;

of Eq. 153; *Lindsay v. Pleasants*, 4 Ired. Eq. 820; *Wood v. Cone*, 7 Paige Ch. 471; *North v. Valk*, *Dudley's Eq.* 212; *Wright v. Trustees of Meth. Epis. Church*, *Hoffman*, 202.

¹ 1 Bro. C. C. 503; 1 Lead. Cas. Eq. 872.

² 4 Mad. 492. See, also, *Newby v. Skinner*, 1 Dev. & Bat. Eq. 488; *Bagster v. Fackerell*, 26 Beav. 469; *Wall v. Colshhead*, 2 De G. & J. 683.

³ *Cogan v. Stephens*, 1 Beav. 482, n.

⁴ *Reynolds v. Godlee*, *Johns.* 536, 583; *Hawley v. James*, 5 Paige Ch. 318.

by so doing uniformity in the law is secured, and no just ground for making any distinction exists.¹ The reason for refusing to apply the rule in *Smith v. Claxton* to the case of a conversion from personalty into realty, is simply because, as the surplus goes to the executor, it *must* go as personalty; for "whatever he gets in *quâ* executor he must hold as personalty."²

317. In England the tendency which exists to favor the heir has led the courts to draw a distinction between those cases in which there has been an intention to convert "out and out" (as it is termed), and those in which there is an intention to convert only for the purposes of the will; in the former case the heir will be excluded, in the latter he will take. The rule upon this subject has been stated to be "that unless the testator has sufficiently declared his intention not only that the realty shall be converted into personalty for the *purposes of the will*, but further, that the produce of the real estate shall be taken as personalty, whether such purposes take effect or not, so much of the real estate or produce thereof as is not effectually disposed of by the will at the time of the testator's death (whether from the silence or inefficiency of the will itself, or from subsequent lapse), will result to the heir. But every conversion, however absolute in its terms, will be deemed a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin."³ To such an extent has this doctrine been carried in England that in *Fitch v. Weber* it was held that the right of the heir was not defeated by an express declaration in the will, that the fund should be considered a *personal* fund, and should in no case lapse or result for his benefit.⁴

¹ See remarks of Lord Cottenham, when Master of the Rolls, in *Cogan v. Stephens*, 1 Beav. 482, n.

² *Reynolds v. Godlee*, Johns. 536, 583, per Vice-Chancellor Wood.

³ Mr. Cox's note to *Cruse v. Barley*, 3 P. Wms. 22; 1 Jarm. on Wills, 530; *Amphlett v. Parke*, 2 Russ. & My. 221; *Taylor v. Taylor*, 3 De G. M. & G. 190; *Robinson v. The Governors*, 10 Hare, 19;

Barrs v. Fewkes, 2 Hen. & M. 60; and on rehearing, 11 Jur. N. S. 669; *Nagle's Appeal*, 1 Harris (Pa.) 260, 264; *Bedford v. Bedford*, 35 Beav. 584; note to *Ackroyd v. Smithson*, 1 Lead. Cas. Eq. 889.

⁴ 6 Hare, 145. See *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524, for an illustration of the extent to which the heir is favored in England.

318. In the United States the rule under consideration has not received a construction so favorable to the heir. In *Craig v. Leslie*, it was said to be settled, "that, if the intent of the testator appears to have been to stamp upon the proceeds of the land described to be sold the quality of personalty not only to subserve the particular purposes of the will, but to all intents, the claim of the heir-at-law to a resulting trust is defeated, and the estate is considered to be personal."¹ It was accordingly held that the blending of the proceeds of the realty with the personalty, so as to form a common fund, for all the purposes of the will, though it should happen that some of them fail, will render the conversion absolute.²

319. Having considered the cases of the failure of the purposes of a conversion in *wills*, it will be proper to say a few words upon the same subject in cases under settlements or other instruments *inter vivos*. In such cases the rule is the same whether land is to be converted into money or money into land;³ the surplus results always to the settlor in its converted, not in its original form.⁴ The reason of the distinction, in this respect, between conversions under wills and those under conveyances *inter vivos*, is because in the latter cases the instrument takes effect upon its delivery, and therefore the deed operates simply as a declaration on the part of the settlor, "from the time I put my hand to this deed, I limit so much of this property to myself as personal property."⁵

320. Having noticed the general effects and purposes of a conversion, the next subject for consideration is the *time* as from which the conversion is supposed to take place.

The general rule is that in the case of a will, the conversion takes place from the death of the testator; in the case of a deed, it takes place from the date of the delivery of the deed.

This rule, so far as it concerns deeds, is well illustrated by the case of *Clarke v. Franklin*.⁶ There the trust was (after the determination of the life estate of the settlor) to sell certain real estate, and apply the proceeds first to making payments to cer-

¹ 3 Wheat. 568.

⁴ *Clarke v. Franklin*, 4 K. & J. 263.

² *Id.* See, also, *Burr v. Sim*, 1 Whart. 252; *Morrow v. Brenizer*, 2 Rawle, 185.

⁵ *Id.*

⁶ 4 K. & J. 257.

³ Snell's Principles of Equity, 157.

tain persons who should then be living, and the residue to a charity. The charitable gift was void, and the question was whether the residue resulted to the heir or the next of kin of the settlor; and this depended, of course, upon the time as from which the conversion was to be considered as taking place. If the conversion took place immediately upon the delivery of the deed of settlement, then the residue would result to the settlor at once as personalty, and would on his death go to his next of kin; but if, on the other hand, the conversion did not take place until the time when the sale was (by the terms of the trust) to take place, viz., after the settlor's death, then in the *interim* the property continued to be real estate, and descended as such to the heir of the settlor. Vice-Chancellor Wood decided in favor of the personal representatives of the settlor; or, in other words, that the conversion had taken place as of the date of the delivery of the deed.

But this rule does not apply to the case of a mortgage with a power of sale; for the intention of the mortgagor cannot be presumed to be to work an immediate conversion, but only to raise money. Where, therefore, the mortgaged estate was sold, after the death of the mortgagor, it was held that the surplus, after paying the mortgage debt, went to the heir of the mortgagor, because the equity of redemption had descended to him.¹

321. It has been already observed that a contract of sale, which is binding on the vendor, will work a conversion, although the purchase is at the option of the vendee.² When the option is exercised the conversion takes place, and it will then relate back to the date of the contract, and the property will be considered as converted from that time.³ If the option is exercised after the death of the vendor, and he has made no specific devise of the property, the purchase-money will go to his personal representatives generally; but if he has specifically, and in express terms, devised the land upon certain limitations, the purchase-money will go in accordance with those limitations.⁴ If, however, a testator makes a specific devise, and after the execution of his will enters into a contract of sale at the option of the pur-

¹ Wright v. Rose, 2 Sim. & St. 323.

² Ante, p. 294.

³ Lawes v. Bennet, 1 Cox, 167.

⁴ See Drant v. Vause, 1 Y. & C. C. C. 580; Collingwood v. Row, 3 Jur. N. S. 735; Snell's Eq. 146.

chaser, the inference is that the testator meant his property to go according to the state to which it would be reduced by the exercise of that option, and the specific devisee will not take.¹

Until the option to purchase is exercised, the intermediate rents will go to the persons who were entitled to the property up to that time as real estate.²

322. The last topic which requires notice under the head of Conversion is that of Reconversion, which has been defined to be "that notional or imaginary process by which a prior constructive conversion is annulled and taken away, and the converted property restored in contemplation of equity to its original actual quality."³ In other words, a reconversion is where the direction to convert is countermanded by the parties entitled to the property, or by act of law.

And, first, the reconversion may take place by act of the party, or by election as it is termed. The simplest case is where there is a trust to sell and pay the entire proceeds of the sale to A. Here A. has a right to say that he prefers to take the property in its original instead of its converted state; in other words, he elects to take the land.

323. This election may take place either by express declaration, or by some act indicating a preference to enjoy the land in its actual state.⁴ The act, however, must be clear and unequivocal, and of such a character as to leave no reasonable doubt of the intent.⁵ No inference, for example, can be drawn from mere lapse of time.⁶ Nor can a reconversion take place as a general rule, unless all the parties in interest unite to elect; for where several persons have an interest in the proceeds of a sale, it does not lie in the power of any one of them to disappoint the others by preventing the sale from taking place.⁷ Where, however, there was a direction to lay out a certain sum of money in land, to be equally divided between A., B., and C., and A. died leaving an infant heir, and B. and C. together with the infant heir filed

¹ Weeding v. Weeding, 1 Johns. & H. 424.

² Townley v. Bedwell, 14 Ves. 591; *Ex parte Hardy*, 30 Beav. 206.

³ Snell's Principles of Equity, 160.

⁴ Davies v. Ashford, 15 Sim. 42.

⁵ Beatty v. Byers, 6 Harris (Pa.), 105.

⁶ Beatty v. Byers (*supra*).

⁷ Holloway v. Radcliffe, 23 Beav. 163; Willing v. Peters, 7 Barr, 290; Beatty v. Byers, 6 Harris, 105.

a bill for the money, it was held (although an infant cannot elect) that B. and C. were entitled to take their shares (two-thirds) in money.¹

324. A remainder-man cannot elect so as to affect the interests of owners of prior estates.² A lunatic cannot elect;³ nor can an infant ordinarily,⁴ but may do so when it is found to be for his benefit.⁵

Married women were, in England, formerly only able to effect a reconversion either by means of the pious fraud of a sham purchase of real estate, and a subsequent levying of a fine, or by coming into court, and there giving their consent to take the money as personal estate.⁶ The inconvenience attending these methods of effecting a reconversion finally led to the passage of a statute by which a married woman was permitted, by deed executed in compliance with its provisions, to make her election to take or dispose of money to be laid out in land.⁷

325. Reconversion sometimes takes place by operation of law. This occurs when a fund directed or covenanted to be laid out in real estate comes into the hands of the person for whose benefit the purchase is to be made, and in whom the entire right is vested, and he dies without making any declaration of his intention. The fund is then said to be "at home," and "being in the hands of one without any other use, but for himself it will be money, and the heir cannot claim."⁸ *Chichester v. Bickerstaff*⁹ is a case which illustrates the doctrine of reconversion by operation of law. In that case Sir John Chichester, on his marriage with the daughter of Sir Charles Bickerstaff, covenanted to advance £1500 within three years to be laid out in land of which the ultimate limitation was to his right heirs. Within a year after the marriage the wife died childless, and Sir John died three days after his wife. By his will he made Bicker-

¹ *Seeley v. Jago*, 1 P. Wms. 389.

² 2 Spence Eq. 271; *Crabtree v. Bramble*, 3 Atk. 686; *Cookson v. Cookson*, 12 Cl. & Fin. 146; *Snell's Prin. of Eq.* 162.

³ *Ashby v. Palmer*, 1 Mer. 296.

⁴ *Seeley v. Jago*, 1 P. Wms. 389; *Robinson v. Robinson*, 19 Beav. 494.

⁵ *Robinson v. Robinson*, *ut sup.*

⁶ *Oldham v. Hughes*, 2 Atk. 452.

⁷ 3 & 4 Will. IV., c. 74, s. 77; *Forbes v. Adams*, 9 Sim. 462; *Snell's Eq.* 163, 164.

⁸ Per Lord Thurlow in *Pulteney v. Darlington*, 1 Bro. Ch. C. 223; 7 Bro. P. C. 530; *Rich v. Whitfield*, L. R. 2 Eq. 583; note to *Fletcher v. Ashburner*, 1 Lead. Cas. Eq. 838.

⁹ 2 Vern. 295.

staff his executor, and his sister, Frances Chichester, his residuary legatee. His heir-at-law then filed a bill against Bickerstaff, claiming that as the £1500 was to have been laid out in land, it ought to go to him under the limitations in the settlement. But Lord Somers said that the money, though once bound by the articles, yet when the wife died without issue became free again; in other words, that it was then to be considered as *at home* in Sir John's hands. The bill was therefore dismissed.

CHAPTER VI.

ADJUSTMENT.

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| 326. Equities to be considered under Adjustment: Set-off, Contribution, Exoneration, Subrogation, and Marshalling. | 338. Qualifications. |
| 327. Set-off. | 339. Surety can compel a creditor to make a prompt use of his remedies. |
| 328. Contribution; application most frequent in case of sureties. | 340. Marshalling. |
| 329. No contribution originally enforceable at law; advantages of equitable proceeding. | 341. Usually enforced through the medium of subrogation. |
| 330. General rules as to right of contribution. | 342. How the equity of marshalling is sometimes qualified. |
| 331. Exoneration; not originally enforceable at law. | 343. Its application in cases of bankruptcy. |
| 332. Cases in which these equities are usually applied. | 344. Cases in which this equity is usually applied in the United States. |
| 333. Sales of different parcels of mortgaged land to successive purchasers. | 345. Marshalling as applied to estates of decedents. |
| 334. General average. | 346. Order in which assets of a decedent are applied to the payment of his debts. |
| 335. Subrogation; nature of the right. | 347. How the general personalty may be exonerated. |
| 336. Judgment may be kept alive after it is paid, in order to protect equities. | 348. Exoneration by implication. |
| 337. Extent of the doctrine of subrogation. | 349. When realty and personalty contribute <i>pro ratâ</i> . |
| | 350. Assets will not be marshalled in favor of a charity. |

326. THE equities which may be classed under the general head of Adjustment are those which are applied mainly to the determination of the rights and liabilities which grow out of the relation of debtor and creditor, although they are also appli-

cable to those which arise out of various other relations. Taking the position of debtor and creditor as a type, it is plain that the rights and liabilities arising therefrom may exist either between the debtor and creditor simply ; or between debtors *inter sese* ; or between debtors of a certain class on the one hand, and their co-debtors and the creditor on the other ; or, finally, between creditors of a certain class on the one hand, and their co-creditors and the debtor, and volunteers claiming under them, on the other ; and that these rights and liabilities may thus be of a greater or less complicated character, and be affected by a few or many considerations.

From these different positions which parties may thus occupy towards each other, spring the different equities of Set-off, Contribution, Exoneration, Subrogation, and Marshalling.

They may all be conveniently classed under the general head of Adjustment of Liabilities ; for they all depend upon the application of certain general maxims which tend to throw burdens upon those who should justly bear them, but only in their due proportion and in their proper order, and to secure benefits to those who are of right entitled thereto, consistently with, and with just regard to the rights of others. The maxims referred to are such as express the general principles of law and equity that he who reaps the benefit should also incur the burden, that equality is equity, and the like ; and they all look to the orderly and equitable enforcement of liabilities against the parties by whom, and in favor of those to whom they are justly due.

327. The right of set-off, although it did not originally exist at common law, was, nevertheless, so effectually introduced by statute, that it now, perhaps, furnishes no ground for interference by a chancellor as an *equitable right*.¹ It is, indeed, largely applied in equity in bills for an account ; but that is, as will be seen, an *equitable remedy* which depends for its existence and

¹ For an account of the principles upon which equity originally allowed the right of set-off, and the manner in which the necessity for the exercise of its jurisdiction came to be superseded by statute, see *Ex parte Stephens*, 11 Ves. 27 ; *Green v. Farmer*, 4 Burr. 2220, 2221 ; *Freeman v. Lomas*, 9 Hare, 116. See, also, *Duncan v. Lyon*, 3 Johns. Ch. R. 358 ; *Dale v. Cooke*, 4 *Id.* 11 ; *Howe v. Sheppard*, 2 Sumn. 133 ; *Greene v. Darling*, 5 Mason, 207 ; *Gordon v. Lewis*, 2 Sumn. 628 ; *Blake v. Langdon*, 19 Verm. 485 ; *Story's Eq.*, § 1430 *et seq.*

exercise, not upon the refusal of courts of law to recognize a right, but from their inability, conveniently and properly, to administer it. Some claims, also, could be set off in equity which might not have been allowed at law, as, for example, a debt which had been assigned, and which (being a *chose in action*, and, therefore, not assignable at law) could be treated as belonging to the assignee in equity alone, and, therefore, in equity alone could be made available as a set-off.¹ But it is obvious, that cases such as these depend upon certain equitable titles or equitable rights, already noticed; and that the enforcement of the right of set-off in bills for an account is referable to the equitable remedy, and will be considered under that head.

¹ See Haynes's Outlines of Equity, 158. Perhaps no clearer or more succinct statement of the origin of the doctrine of set-off can be found, than that contained in this little treatise, and it may be here quoted with advantage. "By the civil law," says Haynes, "if A. was indebted to B., and before he discharged his liability B. became indebted to him, what was called 'compensation' took place, that is to say, A.'s liability to B. became *ipso facto* extinguished partially or wholly according to the amount of B.'s liability to him. This doctrine of compensation was founded on a principle of natural equity or good sense, which forbids that a man should be compelled to pay one moment what he will be entitled to recover back the next; or, to use the words of the civil law, 'Ideo compensatio necessaria est quia interest nostrâ potius non solvere quam solutum repetere.' Now the common law utterly refused to recognize this principle of justice. If B. owed A. money and A. owed B. money, A. was entitled to recover from B., although the amount of his debt was greater, and although he might himself be in insolvent circumstances, and thus by being first in the case he might obtain judgment and payment of the amount recovered, leaving B. to sue subsequently for his own debt, and recover a judgment of his own

bearing no fruits. Nay, even if A. had actually become bankrupt, so that his assignees had become entitled to what was owing from B., the law allowed A.'s assignees to recover from B. the whole amount, leaving B. to go in under the bankruptcy and prove against A.'s estate, and recover a dividend only. The glaring injustice of these results in cases of bankruptcy led to the first legislative mitigation, viz., that effected in Anne's reign of allowing a set-off in cases of mutual credits and mutual debts between the bankrupt and any person. About a quarter of a century later, by a short and unobtrusive section in an act which is entitled 'An Act for the relief of debtors, with respect to the imprisonment of their persons' (2 Geo. II., c. 22, § 13), a most important alteration was effected in the law by enacting that in cases of mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set off against the other. And it is under this enactment, made perpetual and extended by a subsequent act (8 Geo. II., c. 24, §§ 4, 5), that the right of set-off still exists at law." Haynes's Outlines of Equity, 153, 154. See, also, notes to *Rose v. Hart*, 2 Sm. Lead. Cas. 293.

328. The equities to be considered at present are those of Contribution, Exoneration, Subrogation, and Marshalling.

The equity for Contribution arises when one of several parties who are liable to a common debt or obligation, discharges the same for the benefit of all. It is founded not on contract, but on the general principles of justice stated above.¹ Its application is seen most frequently in the case of sureties; but it will, of course, be borne in mind, that the rules stated in regard to this particular class of debtors are, in general, true as to all parties who are liable in common to a debt or charge of any kind.

Where there are two or more sureties, and one pays the debt for which all are bound, the surety who pays has a right to recover from each of his co-sureties his proportionate share of the common burden; in other words, he has the right to enforce contribution. This right may be asserted through the medium of a bill in equity.

329. No contribution could have been enforced at common law, and the relief given in equity was consequently based upon the general principle that no redress could be had elsewhere.² Subsequently, however, the common law courts began to administer relief by virtue of an implied assumpsit, and the remedy thus established has been applied, especially in this country, to most cases of contribution.³ Nevertheless the remedy in equity is in many respects superior. At law separate actions would have to be brought against each co-surety; whereas in equity, all of the co-sureties could be made liable in the same bill, and the rights of sureties as against the principal could be

¹ *Dering v. Earl of Winchelsea*, 1 Cox, 318; 1 Lead. Cas. Eq. 100; *Whiting v. Burke*, L. R. 10 Eq. 539; 6 Ch. App. 342; *Yonge v. Reynell*, 9 Hare, 809; *Stirling v. Forrester*, 3 Bligh, 575; *McMahon v. Fawcett*, 2 Rand. 514; *Moore v. Moore*, 4 Hawks, 358, 360; *Moore v. Isley*, 2 Dev. & Bat. Eq. 372; *Allen v. Wood*, 3 Ired. Eq. 386; *Screven v. Joyner*, 1 Hill, Eq. 252; *McKenna v. George*, 2 Rich. Eq. 15; *Breckinridge v. Taylor*, 5 Dana, 110; *Mills v. Hyde*, 19 Verm. 59; *Strong v. Mitchell*, *Id.* 644;

Craig v. Ankeney, 4 Gill, 225; *Campbell v. Mesier*, 4 Johns. Ch. 334; 6 *Id.* 21.

² Note to *Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq. 100; *Harris v. Ferguson*, 2 Bailey, 397; *Norton v. Coons*, 3 Denio, 130.

³ *Johnson v. Johnson*, 11 Mass. 359; *Bezzell v. White*, 13 Alab. 422; *Fletcher v. Grover*, 11 N. Hamp. 368; *Agnew v. Bell*, 4 Watts, 31; *Mason v. Lord*, 20 Pick. 447; *Norton v. Coons*, 3 Denio, 130; *Foster v. Johnson*, 5 Verm. 60; *Boyd v. McDonough*, 39 How. Pr. R. (N. Y.) 389.

adjusted in the same action.¹ At law the co-surety was compellable only to contribute his *pro rata* proportion, having regard to the whole number of sureties, without reference to the fact that some one or more of them might be insolvent;² whereas in equity, the burden of the debt is divided among the solvent sureties, and the party paying, therefore, recovers from each of the others an amount dependent upon the number of those who are actually able to pay.³ At law contribution could not have been enforced against the representatives of a deceased surety; but in equity the rule is otherwise. It is, therefore, well settled that the jurisdiction of courts of chancery still remains.⁴

330. Such being the origin of contribution as an equity, a few of the principles by which its application is regulated may be briefly stated. A surety is not entitled to speculate upon the debt. If he compromises the claim his co-sureties are entitled to the benefit of the compromise. They are responsible only for their proportion of the amount actually paid,⁵ with interest.⁶

Before contribution can be enforced the surety must actually have paid the debt;⁷ and he must, moreover, resort in the first instance to the principal. It is only when he fails to obtain reimbursement from the principal, that he is entitled to call upon his co-sureties.⁸ On the other hand, the discharge of a surety from his principal obligation without discharging his co-

¹ See *Craythorne v. Swinburne*, 14 Ves. 160.

² *Cowell v. Edwards*, 2 B. & P. 268.

³ *Burrows v. McWhann*, 1 Desaus. 409; *Breckinridge v. Taylor*, 5 Dana, 110; *Hitchman v. Stewart*, 3 Drew. 271. Departure from the State has the same effect upon the rights and liabilities of the remaining sureties as insolvency. *McKenna v. George*, 2 Rich. Eq. 15.

⁴ *Wayland v. Tucker*, 4 Grat. 267; *Couch v. Terry*, 12 Alab. 225; *Wright v. Hunter*, 5 Ves. 792.

⁵ *Hickman v. McCurdy*, 7 J. J. Marsh. 555. Nor has a surety any right to speculate upon his principal. *Wynn v. Brooke*, 5 Rawle, 106; *Bonney v. Seely*, 2 Wend 481; *Lawrence v. Blow*, 2 Leigh, 30.

⁶ *In re Swan's Est.*, 4 Ir. R. Eq. 209.

⁷ *Wood v. Leland*, 1 Met. 387; *Glass v. Pullen*, 6 Bush, 346. But he may pay part of the debt by a set-off; and his right of subrogation will not be for the balance only, but will extend to the whole amount of the creditor's claim. *City of Keokuk v. Love*, 31 Iowa, 119.

⁸ See *Camp v. Bostwick*, 20 Ohio St. 337. See, however, *Bowen v. Hoskins*, 45 Miss. 183. The rule at law is different, as the better opinion seems to be that in a common law action, a surety may recover from his co-surety without showing the insolvency of the principal. See the reason explained in 1 Lead. Cas. Eq. 169.

sureties, will not relieve him of his liability to them for contribution.¹

The circumstance that the sureties are bound by different instruments, or at different times, does not affect the right of contribution, provided always that they are bound for the same debt, and really occupy towards each other the position of co-sureties.² But if each suretyship is a distinct and separate transaction (as for distinct and separate portions of the same debt), the right of contribution will not exist.³

If the sureties are not bound for the same thing, or do not occupy towards each other the same relative positions, then one of three results may follow—either, first, the surety paying the debt may have no right of contribution; or, secondly, a surety first in point of time may have no remedy as against one who is subsequent; or, thirdly, a subsequent surety may have no right as against the first.⁴ Of the first of the above results the case of a substituted surety is an illustration; he has, of course, no right of contribution as against the surety whose place he takes.⁵ Of the second class, an instance may be found in a case in which a note was signed by A. as principal, and B. as surety, and then by C. as “surety for the above names,” and C. was held not liable to contribute to B.⁶ The third of the above class of liabilities may be illustrated by the case of a party who becomes surety on a bail-bond or appeal-bond in an action against the principal in the original obligation, and is subsequently compelled to pay the debt. Such a surety, though subsequent in point of date, has no right to call upon a surety in the original obligation for contribution.⁷ These various liabilities of sureties depend frequently upon the express understanding of

¹ *Clapp v. Rice*, 15 Gray, 557.

² *Armitage v. Pulver*, 37 N. Y. 494; *Breckinridge v. Taylor*, 5 Dana, 110, 112; *Bell v. Jasper*, 2 Ired. Eq. 597; *Stout v. Vauce*, 1 Robinson (Va.), 169; *Warner v. Price*, 3 Wend. 397; *Coope v. Twynam*, 1 T. & R. 426.

³ *Moore v. Isley*, 2 Dev. & Bat. (Eq.) 372; *Langford v. Perrin*, 5 Leigh, 552.

⁴ See American note to *Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq. 157.

⁵ *Hutchins v. McCauley*, 2 Dev. & Bat.

Eq. 399; *Longley v. Griggs*, 10 Pick. 121.

⁶ *Harris v. Warner*, 13 Wend. 400;

Thompson v. Sanders, 4 Dev. & Bat. 404.

⁷ *Douglass v. Fagg*, 8 Leigh, 588;

Burns v. The Huntingdon Bank, 1 Pen.

& Watts, 395; *Schnitzel's Appeal*, 13

Wright (Pa.), 23. See, however, *Hart-*

well v. Smith, 15 Ohio St. 200.

the parties to the transaction, and oral testimony is, as a general rule, admissible to show what that understanding was.¹

As the right of contribution is an equitable right, it will not be enforced as against superior equities of a third party;² or of the co-surety; nor will it be enforced to the prejudice or injury of the creditor.³

331. As the right of contribution is one which exists between those who are equally liable for the same debt, so the right of Exoneration, as the term implies, exists between those who are successively liable. A surety who discharges an obligation is entitled to look to the principal for reimbursement, and to invoke the aid of a court of equity for this purpose,⁴ and a subsequent surety who, by the terms of the contract, is responsible only in the case of the default of the principal and a prior surety, may claim exoneration at the hands of either.⁵

This right, like that of contribution, could not originally have been enforced at law; but a legal remedy now exists by virtue of an implied promise to indemnify. The equitable jurisdiction, however, is still maintained, on principles which have been before referred to.

The better opinion seems to be that a surety is entitled to recover from the principal not only the amount of the debt which he has paid, but also the costs incurred.⁶

The surety is entitled to file a bill against the principal at any time after the debt has fallen due, to compel payment, although he may not have been sued.

332. The equity of exoneration is frequently applied in the administration of the assets of decedents. Thus, the personal property is generally the primary fund for the payment of debts. And hence it is well settled that if a person borrows money and

¹ *Barry v. Ranson*, 12 N. Y. 462; *Apgar v. Hiler*, 4 Zab. 808; *Hendrick v. Whittemore*, 105 Mass. 23.

² *Erb's Appeal*, 2 Pen. & Watts, 296; *Bank of Penna. v. Potius*, 10 Watts, 152; *Union Bank v. Edwards*, 1 Gill. & J. 346.

³ *Hollingsworth v. Floyd*, 2 Har. & G. 87.

⁴ *Moore v. Young*, 1 Dana, 516; *Baxter v. Moore*, 5 Leigh, 219; *The Wesley Church v. Moore*, 10 Barr, 273. The

doctrine applies to a mortgage by a wife of her separate property for her husband's debt; *Aguilar v. Aguilar*, 5 Mad. 414; *Neimcewicz v. Gahn*, 2 Paige, Ch. 614; 11 Wend. 312; *Savage v. Winchester*, 15 Gray, 453.

⁵ See *Harris v. Warner*, 13 Wend. 400; *Thompson v. Sanders*, 4 Dev. & Bat. 404.

⁶ *Wynn v. Brooke*, 5 Rawle, 106; *Hayden v. Cabot*, 17 Mass. 169.

gives his bond and mortgage for the debt, the mortgage is merely a collateral security for the personal obligation, and the heir or devisee may call upon the executor to exonerate the land by an application of the personal assets to the discharge of the mortgage.¹ The subject will be noticed hereafter.²

The equities of contribution and exoneration arise only when the payment is made in discharge of a binding obligation. If the payment is voluntary, it gives no title to contribution. Thus a co-owner cannot, as a general rule, claim a *pro rata* reimbursement for the amounts expended by him for meliorations and repairs to the property.³

No right of contribution exists where the demand is *ex delicto*.⁴ In cases of breach of trust, however, not involving actual fraud, contribution may be enforced by trustees as between themselves.⁵

333. It has been stated, already, that the case of suretyship was only one instance of the general doctrine of contribution. Some other instances may be briefly noticed. If a mortgaged estate is sold to several parties, and one of the parties pays the mortgage, he will be entitled to contribution.⁶ This equity is not binding on the creditor, but if he renders its performance impossible by cancelling the debt as against one of the lots when he has notice of the prior conveyance, he can only enforce payment of a proportionable share as against the others.⁷ This rule does not apply when the purchases of the different parcels take place at different times. If any parcel remains in the hands of

¹ See case of Keyzey, Jr., 9 Serg. & Rawle, 71; Cumberland v. Codrington, 3 Johns. C. R. 229, 257; Hewes v. Dehor, 3 Gray, 205; Goodburn v. Stevens, 1 Maryl. Ch. 420; note to Duke of Ancaster v. Mayer, 1 Lead. Cas. Eq. 642.

² See *post*, p. 322.

³ Hardy v. Sproule, 31 Maine, 71; Reed v. Bachelder, 34 *Id.* 205; Turner v. Burrows, 8 Wend. 144; Anderson v. Greble, 1 Ashmead, 136; Adams's Doct. of Eq. 267.

⁴ Peck v. Ellis, 2 Johns. Ch. R. 131; Bartle v. Nutt, 4 Peters, 184. See, for exceptions to the general rule, Acheson v. Miller, 2 Ohio (N. S.), 203; Moore v. Appleton, 26 Alab. 633.

⁵ See Hill on Trustees, 814, notes (4th Am. ed.).

⁶ White v. White, 9 Ves. 554; Jones v. Jones, 5 Hare, 440; Thomas v. Hearn, 2 Porter, 262; Chamberlayne v. Temple, 2 Rand. 384; Dupuy v. Johnson, 1 Bibb, 562; Poston v. Eubank, 3 J. J. Marsh. 42; Williams v. Craig, 2 Edw. Ch. 297; Aiken v. Gale, 37 N. Hamp. 501.

⁷ Stirling v. Forrester, 3 Bligh, O. S. 575, 590; Stevens v. Cooper, 1 Johns. Ch. 425; Cheesebrough v. Millard, *Id.* 409; Guion v. Knapp, 6 Paige, 35; Paxton v. Harrier, 1 Jones (Pa.), 312; Jones v. Myrick, 8 Gratt. 180; George v. Wood, 9 Allen, 83; Stillman v. Stillman, 6 C. E. Green, 126; Fassett v. Traber, 20 Ohio, 540. See, also, Lloyd v. Galbraith, 8 Casey, 103; Lock v. Fulford, 52 Ill. 166.

the vendor, that parcel will be first liable; the purchaser of the last lot will be liable to make good the loss incurred by the purchaser of a prior lot, and the first purchaser will be the last person who can be held responsible in respect of his lot. In other words, the purchasers will be liable in the inverse order of their purchases.¹

This rule, of course, only applies when the sale of the lot is made free of encumbrances. If the purchaser takes it subject to the mortgages, the presumption is that the amount has been deducted from the purchase-money, and the burden of the mortgage ought therefore justly to fall upon the vendee; and in such a case if the vendor or those claiming under him by subsequent sales are compelled to pay the mortgage, they will be entitled to exoneration at the hands of the first purchaser.²

334. The doctrine of general average is another illustration of the right of contribution. It is called into play when a loss arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo, in which case the loss must be borne proportionably by all who are interested. Thus, where goods are thrown overboard, or a portion of the ship's rigging cut away, to lighten and save the ship, or the ship itself is intentionally stranded to save her cargo from a tempest or an enemy, or a part of the cargo is delivered up by way of ransom, or is sold for the necessity of the ship; in all such cases, as the impending danger is common to all, the loss incurred in averting the same should be borne by all.

¹ *Clowes v. Dickenson*, 5 Johns. Ch. 235; 9 Cow. 403; *Cowden's Est.*, 1 Barr, 267; *Mevey's Appeal*, 4 Barr, 80; *Paxton v. Harrier*, 1 Jones (Pa.), 312; *Holden v. Pike*, 24 Maine, 427; *Sheperd v. Adams*, 32 *Id.* 63; *Allen v. Clark*, 17 Pick. 47 (though see *Parkman v. Welch*, 19 Pick. 231); *Pallen v. The Agricultural Bank*, 1 Freem. 419; *The Agricultural Bank v. Pallen*, 8 Sm. & Marsh. 357; *Thompson v. Murray*, 2 Hill Ch. 204, 213; *Wright v. Atkinson*, 3 Sneed, 585; *Conrad v. Harrison*, 3 Leigh, 532; *Blair v. Ward*, 2 Stock. Ch. 119; *Mount v. Potts*, 8 C. E. Green, 188; *The Commercial Bank v. The Western Reserve Bank*, 11 Ohio, 444. But in Kentucky, in *Dickey v. Thompson*,

8 B. Monroe, 312, the court of appeals refused to follow the doctrine in *Clowes v. Dickenson*; and in Massachusetts its application would seem to depend upon the presence of covenants of warranty; *Chase v. Woodbury*, 6 Cush. 148; *Bradley v. George*, 2 Allen, 392; *George v. Wood*, 11 *Id.* 41. But elsewhere the question is considered one of *contract* simply, and the existence of the covenant is regarded merely as *evidence* by which the intention of the parties is to be ascertained. See *Rawle on Covenants for Title*, 532 and 565 (4th ed.), where the authorities are examined.

² See Am. note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. 238.

It was, at one time, thought that the sole jurisdiction to recover contribution in cases of general average resided in the court of chancery ; but it is now settled that the jurisdiction of equity is only concurrent, and that the party seeking contribution may enforce his right through the medium of the common law action of *assumpsit*.¹

The equity of contribution is also called into play when one of several tenants in common of land which is subject to a lien, is compelled to pay more than his due proportion in discharge of the same.²

335. The equity of Subrogation springs naturally out of the two equities, just considered, of contribution and exoneration, and is, in fact, one of the means by which those equities are protected and enforced.

Subrogation is the equity by which a person who is secondarily liable for a *debt*, and has paid the same, is put in the place of the creditor so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration as against the principal debtor, or of contribution against others who are liable in the same rank with himself.

Suppose, for example, A. to be a creditor of B., and C. and D. to be sureties for B., and A., moreover, to possess the additional security of a mortgage on B.'s real estate. If, now, C. pays the debt, he will be entitled to have an assignment of the mortgage, and to enforce it against B.'s real estate, in order to assert his right of exoneration.³

So, also, if a co-surety has a security from the principal, the surety paying the debt will be entitled to the benefit of this security.⁴

¹ See notes to *Birkley v. Presgrave*, 1 Tudor's Lead. Cas. Merc. Law, 83 (112, 1st Am. ed.).

² *Gearhart v. Dixon*, 1 Barr, 224.

³ See *Drew v. Lockett*, 32 Beav. 499. See, also, *Billings v. Sprague*, 49 Ill. 509; *Kirkman v. The Bank*, 2 Cold. 397; *Dearborn v. Taylor*, 18 N. Hamp 153; *Klopp v. Lebanon Bank*, 10 Wright (Pa.), 88; *McNeile v. McNeile*, 36 Alab. 109; *Sears v. Laforce*, 17 Iowa, 478; *Lewis v.*

Palmer, 28 N. Y. 271; *York v. Landis*, 65 N. Carolina, 535; *Storms v. Storms*, 3 Bush, 77; *Irick v. Black*, 2 C. E. Green, 189; *Rhame v. Lewis*, 13 Rich. Eq. 269.

⁴ *Copis v. Middleton*, T. & R. 231; *Parham v. Green*, 64 N. Carolina, 436; *McCune v. Belt*, 45 Mis. 174; *Aldrich v. Hapgood*, 39 Verm. 617; *Brown v. Ray*, 18 N. Hamp. 102; *Agnew v. Bell*, 4 Watts, 31; *Hinsdill v. Murray*, 6 Verm. 136; *Moore v. Moore*, 4 Hawks, 358;

The same doctrine is also frequently applied when a junior encumbrancer is compelled for his own protection to pay off a prior lien.¹

336. This equity of subrogation is one eminently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation, and is one, therefore, which is much encouraged and protected. This may be seen from the rule, which allows the surety to keep alive a judgment for the purpose of obtaining satisfaction out of the principal. Ordinarily the payment of a debt operates as its extinguishment, and the judgment obtained for the debt would necessarily fall with it. To apply the rule to the case of a surety paying the debt would obviously work injustice in many instances; for, by coming in as a simple contract creditor, the surety might lose his chance of reimbursement. It has accordingly been held, and must be considered to be the generally received doctrine, that a surety who pays a debt which has been reduced to judgment, is entitled to have the judgment kept alive for his benefit, and to enjoy, as against the principal debtor, exactly the same advantages which could have been claimed by the judgment creditor. In England, indeed, the law had been settled the other way by Lord Eldon,² whose ruling was followed by Lord Brougham,³ but the hardship of this ruling led ultimately to the passage of a statute authorizing the judgment to be kept alive for the benefit of sureties;⁴ and the ruling in this country, except in Alabama, North Carolina, and Vermont,⁵ has been the other way, and the doctrine established as stated above.⁶ Payment of the debt, in short, is considered to operate as an assignment of

note to *Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq. 162. See, however, *Hall v. Cushman*, 16 N. Hamp. 462.

¹ *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Mozier's Appeal*, 6 P. F. Smith, 76. See, also, *Wallace's Appeal*, 5 Barr, 103.

² *Copis v. Middleton*, 1 T. & R. 229.

³ *Hodgson v. Shaw*, 3 My. & K. 190.

⁴ 19 & 20 Vic., c. 97.

⁵ *Houston v. The Bank*, 25 Alab. 250; *Briley v. Sugg*, 1 Dev. & Bat. (Eq.) 366; *Pierson v. Catlin*, 18 Verm. 77.

⁶ *Lathrop and Dale's Appeal*, 1 Barr, 512; *Cottrell's Appeal*, 11 Harris (Pa.), 294; *Bailey v. Brownfield*, 8 *Id.* 41; *Goodyear v. Watson*, 14 Barb. 481; *Marsh v. Pike*, 10 Paige, 595; *Tinsley v. Anderson*, 3 Call, 285; *McDougal v. Dougherty*, 14 Geo. 674; *Burrows v. M'Whann*, 1 Desaus. 409; *Norwood v. Norwood*, 2 Har. & Johns. 238; *Watkins v. Worthington*, 2 Bland, 509; *Atwood v. Vincent*, 17 Conn. 575; *Norton v. Soule*, 2 Greenleaf, 341; *Neilson v. Fry*, 16 Ohio St. 552.

it; and the equity of subrogation has received a more liberal construction in this country than in England.

337. The creditors of a surety are entitled to the same right of subrogation as the surety himself;¹ and, on the other hand, the assignee of the debt, or a subsequent guarantor of the same, will be entitled to be subrogated to all the remedies against the original surety.² A mere stranger who pays the debt cannot claim to be subrogated; but if such payment is in fact a purchase of the debt, and is intended to operate as such, the assignee will acquire as an incident to his purchase the right of subrogation. The question of subrogation in such a case is a question of law, dependent, however, upon the preliminary question of fact whether a purchase or extinguishment of the debt was intended.³

If the owner of a debt assigns it with a guaranty, and is subsequently obliged to make his guaranty good and pay the debt, he will be subrogated to the rights of the assignee as against the principal and sureties in the original debt.

If one surety takes a security from the principal for his own indemnity, it will enure to the benefit of all the sureties.⁴

The principal creditor is entitled to the benefit of any security given to a surety by way of indemnity.⁵

The above cases are merely instances of the right of subrogation, and are not by any means intended as defining narrowly the limits of the doctrine. The principle is a general one, and will apply in every instance (except in the case of a mere stranger) where one man has paid a debt for which another is primarily liable.⁶

The right of subrogation will not, however, exist between parties who are equally bound—as, for example, copartners,

¹ *Neff v. Miller*, 8 Barr, 348.

² *Hughes v. Littlefield*, 18 Maine, 400; *Carter v. Jones*, 5 Ired. Eq. 196; *Matthews v. Aiken*, 1 Comstock, 595; *Talmage v. Burlingame*, 9 Barr, 21; *Peak v. Dorwin*, 25 Verm. 28.

³ See *Swan v. Patterson*, 7 Maryl. 164; *Belshaw v. Bush*, 11 Com. B. 191; *Am. note to Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq. 155.

⁴ *West v. Belches*, 5 Munf. 187; *Mc-*

Mahon v. Fawcett, 2 Rand. 514; *Gregory v. Murrell*, 2 Ired. Eq. 233; *Hinsdill v. Murray*, 6 Verm. 136; *Elwood v. Deifendorf*, 5 Barb. 398; *Rice v. Morton*, 19 Mis. 263.

⁵ See *Wallace's Appeal*, 5 Barr, 103; *Mozier's Appeal*, 6 P. F. Sm. 76; *Rardin v. Walpole*, 38 Ind. 146; *Burwell v. Fauber*, 21 Grat. 446; *Osborn v. Noble*, 46 Miss. 449.

⁶ 1 Lead. Cas. Eq. 154 (American note).

co-obligors, and co-contractors except, of course, by virtue of a special contract.¹

338. The right of subrogation, like that of contribution, is not founded on contract, but on general principles of equity.² Being an equitable right, it is consequently subject to the general qualification by which all equities are affected, namely, that it must not be enforced to the detriment of equal or superior equities existing in other parties, nor where its enforcement would operate to the prejudice or injury of the creditor;³ and therefore not until the creditor is fully paid and satisfied. And it has been said that it will not be enforced as against a legal right.⁴

It is immaterial that the surety did not know of the existence of the security to which he seeks to be subrogated. Whenever he discovers its existence he will be entitled to its benefit.⁵

The equity of subrogation is one which the surety is entitled to exercise against the *debtor*, but it does not give him the right to control the action of the *creditor*. The creditor may pursue any of his remedies which he sees proper to use, and the surety cannot, as a general rule, compel him to resort to any particular securities in the first instance. Special circumstances may, however, take the case out of the general rule, and give the surety a right to require the creditor to look to certain liens before coming upon the surety.⁶ In Pennsylvania, however, under the effect given to a guaranty, the creditor must first push the principal debtor to insolvency before coming upon the party secondarily liable.⁷

The surety may file a bill to compel payment by the principal as soon as the debt becomes due; and he may make the creditor a party to the bill, and avail himself of the creditor's remedies.⁸

339. While it is true that a surety cannot directly control the action of the creditor in regard to the securities held by the

¹ Bailey v. Brownfield, 8 Harris (Pa.), 41; Oakeley v. Pasheller, 10 Bligh, N. R. 548.

² Hayes v. Ward, 4 Johns. Ch. R. 123.

³ Erb's Appeal, 2 Pen. & Watts, 296; ante, page 309, note.

⁴ Fink v. Mahaffy, 8 Watts, 384.

⁵ 1 Lead. Cas. Eq. 144.

⁶ Hayes v. Ward, 4 Johns. Ch. R. 123;

Kent v. Matthews, 12 Leigh, 573; Railroad Co. v. Claghorn, 1 Speer's Eq. 545; Irick v. Black, 2 C. E. Green, 189.

⁷ Parker v. Culvertson, 1 Wal. Jr. 149; Marburger v. Pott, 4 Harris, 13; Reigart v. White, 2 P. F. Smith, 438.

⁸ 1 Lead. Cas. Eq. 144; Dempsey v. Bush, 18 Ohio St. 376.

latter, it has nevertheless been considered that it is the surety's right and a part of his equity to see that the creditor makes a prompt use of the remedies in his hands, and that nothing should be lost by reason of the creditor's supineness or negligence. Following out this thought, the courts of several States in the Union have established the rule that equity will compel the creditor to sue at the request of the surety, and will hold the surety discharged if the request be not complied with, provided that such failure to comply has resulted in actual injury, which must be shown by proving that the principal was solvent when the request was made, and became insolvent subsequently, and provided further, that accompanying the request, there be an explicit notice that in case the creditor shall fail to sue, the surety will thereupon hold himself discharged.¹ This doctrine has been established in New York, Pennsylvania, Alabama, Arkansas, and some other States;² but it has been rejected as unsound in most of the States of the Union.³

The surety may be relieved from his obligation by any variation of the contract between the creditor and principal, made without the surety's consent; for he has a right to say, in such a case, *non in hæc fœdera veni*.

340. The doctrine of marshalling grows out of the principle that a party having two funds to satisfy his demand shall not, by his election, disappoint a party who has only one fund. If A., for example, holds a first mortgage against two parcels of real estate, and B. is the owner of a subsequent mortgage against only one of these parcels, natural justice would seem to require that A. should not resort in the first instance to the parcel covered by B.'s mortgage, but should endeavor to collect his debt from the lot charged with his encumbrance alone, and resort to the portion covered by B.'s mortgage, only for the purpose of making up any deficiency. Justice further requires, that if A. does resort, in the first place, to the parcel covered by B.'s mortgage, that the latter, thus disappointed in his se-

¹ *Singer v. Troutman*, 49 Barb. 182; *Crawford*, 8 Wright (Pa.), 105; *Conrad v. King v. Baldwin*, 17 Johns. 384; *Rutledge v. Greenwood*, 2 Desaus. 389; *Bruce v. Edwards*, 1 Stew. 11; *Cope v. Smith*, 8 Serg. & Rawle, 110; *Hellen v.* *Crawford*, 8 Wright (Pa.), 105; *Conrad v. Foy*, 18 P. F. Smith, 881.
² See preceding note.
³ See American note to *Reese v. Barrington*, 3 Lead. Cas. Eq. 338.

curity, shall be subrogated to A's rights as against the other parcel; and in this way, while sufficient play is given to the rights of one party, protection is, at the same time, afforded to the rights of the other.¹

341. It will be seen from the above illustration that the equity of marshalling would seem to be capable of being carried into effect in one of two ways, either, first, by restraining the party against whom it exists from using a security to the injury of another; or, secondly, by giving the party entitled to the protection of this equity the benefit of another security in lieu of the one of which he has been disappointed. In other words, the right might be enforced either by injunction against the paramount creditor, or by subrogation in favor of the junior creditor. In practice, however, the latter of these two methods is the one most usually employed; and the sounder doctrine seems to be that the first of the two ought not to be resorted to except under very peculiar circumstances. It is true that there are many dicta to the effect that a creditor will be restrained from resorting to one of two sources of payment, and compelled to look to the other;² but in practice the rule has been seldom applied (except under peculiar circumstances), because it would appear to be unjust that a creditor who had taken pains to obtain ample security should be limited in his rights of enforcement, and exposed to delay; more especially as the ends of justice can in general be completely attained by the application of the doctrine of subrogation.³ A paramount encumbrancer ought to be allowed to choose the method of collecting his debt,

¹ In support of the general doctrine stated in the text, see *Cheesebrough v. Millard*, 1 Johns. C. R. 409; *Ramsey's Appeal*, 2 Watts, 228; *Bruner's Appeal*, 7 Watts & Serg. 269; *Hannegan v. Hannah*, 7 Blackf. 353; *Briggs v. The Planters' Bank*, 1 Freem. Ch. 574; *American note to Aldrich v. Cooper*, 2 Lead. Cas. Eq. 219.

² *Aldrich v. Cooper*, 8 Ves. 382; *Clowes v. Dickenson*, 9 Cowen, 403; *Greenwood v. Taylor*, 1 Russ. & My. 185; *Avery v. Pallen*, 8 Sm. & Marsh. 357; *Thompson v. Murray*, 2 Hill Ch. 213; *New York*

Steamboat Co. v. The New Jersey Steamboat Co., 1 Hopkins, 460; *Evans v. Duncan*, 4 Watts, 24.

³ *Mason v. Bogg*, 2 My. & Cr. 448; *Neff's Appeal*, 9 Watts & Serg. 36; *Ramsey's Appeal*, 2 Watts, 228; *Schunk's Appeal*, 2 Barr, 304; *Arna's Appeal*, 15 P. F. Sm. 74; *Dunlap v. Clements*, 7 Alab. 539; *Moses v. Ranlet*, 2 N. Hamp. 488; *Findlay v. Hosmer*, 2 Conn. 350; *West v. The Bank of Rutland*, 19 Verm. 403; *Brinkerhoff v. Marvin*, 5 Johns. Ch. R. 320; *Evertson v. Booth*, 19 Johns. 486.

and all that a junior creditor can fairly ask is that he shall have liberty to resort to another source of payment in place of the one of which he has been deprived. Of course, where both funds are in court, or under its immediate control, the case is different. The rights of every one can be protected, and there is no harm in throwing the paramount creditor at once on the singly charged fund.¹ So, too, when the paramount creditor has been guilty of some negligence or default, as where he has put one of the funds beyond his own reach with the full knowledge that his debt cannot be satisfied out of the other fund without injury to the interests of third persons, he may be restrained from coming in upon the second fund.²

These, however, are exceptions, and perhaps the general rule in this country may be stated to be, that the right of marshalling is usually enforced through the equities of subrogation and contribution.

Nevertheless, there are decisions in some of the States in favor of the doctrine of compulsion;³ while in England, there is some reason for thus restraining the creditor, as under the rule in *Copis v. Middleton* the use of the doubly charged security would operate as its extinguishment, and it could not be kept alive for the benefit of the subsequent encumbrances.⁴

342. The equity of marshalling is subject to certain qualifications which it has become necessary to lay down for the purpose of reaching exact justice.

It cannot be used to prejudice those who have an equal or superior equity against the debtor. Thus if the land of the wife is mortgaged for the husband's debt, a subsequent judgment creditor of the husband cannot claim that the mortgagee shall proceed first upon the property of the wife, nor can he claim to be subrogated to the mortgagor's security against the wife, because the equity of the latter is superior to that of the husband, and is necessarily superior to the equities of his creditors.⁵ On the

¹ See American note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. 276.

² *Stevens v. Cooper*, 1 Johns. Ch. R. 425; *Paxton v. Harrier*, 1 Jones (Pa.), 312; *Parkman v. Wilson*, 19 Pick. 231; *Berry v. The Church*, 7 Maryl. 564; *Mount v. Potts*, 8 C. E. Green, 188.

³ *Ante*, notes to p. 315.

⁴ American note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. 280.

⁵ *Reynolds v. Tooker*, 18 Wend. 591; *Ayres v. Husted*, 15 Conn. 504; *John v. Reardon*, 11 Maryl. 465.

other hand, the exercise of the right of marshalling cannot be defeated by the intervention of creditors of a later date.¹

As a general rule, this equity will not exist as against a creditor of several debtors in favor of a creditor of one of the debtors. The two funds must belong to the same person. Thus, if A. and B. are debtors to C., and A. is also a debtor to D., and C. obtains satisfaction out of A., D. cannot claim to be subrogated to C.'s rights against B.² But this rule may admit of some exceptions. If A., in the case above put, were merely a surety, then it would be B.'s duty to discharge the debt, and if A.'s property were taken for that purpose, his creditors would have the right to be subrogated to the remedies of the joint creditors against B.³ The duty of contribution between joint debtors may also in some instances be enforced by the creditors of one.⁴

The two funds must actually exist; the doctrine of marshalling cannot be invoked for the purpose of raising a fund.⁵

343. The result of throwing a creditor, who has two securities for his debt, upon the singly charged fund, is of course to effect a payment of the debt so far as that fund will extend. Suppose, now, the general assets of the debtor are insufficient to meet all his liabilities, the question will then naturally arise, whether the creditor who has realized a portion of his debt shall be entitled to a dividend on the whole amount of his claim, or only upon the balance remaining after the appropriation of the fund which has been exclusively under his control.

The rule in bankruptcy was that the creditor was only entitled to prove for the residue; the right to resort to the prior security being treated, *pro tanto*, as payment.⁶ But this rule is peculiar to the bankrupt law, and the better doctrine is that it is not applicable to cases outside of that law. Therefore the rule would seem

¹ Withers v. Carter, 4 Grat. 407; Ziegler v. Long, 2 Watts, 205; Bruner's Appeal, 7 Watts & Serg. 269.

² Ayres v. Husted, 15 Conn. 504; Dorr v. Shaw, 4 Johns. Ch. 17; Wise v. Shepherd, 13 Illinois, 41.

³ King v. McVickar, 3 Sandf. Ch. 192; Wise v. Shepherd, 13 Ill. 41.

⁴ See American note to Aldrich v. Cooper, 2 Lead. Cas. Eq. 222.

⁵ The Professional Life Assurance Co.'s Case, L. R. 3 Eq. 668.

⁶ By the 20th section of the Bankruptcy Act of 1867, the creditors of a bankrupt who hold security have the option either to prove for the balance of their claim, or to surrender the property held as security and prove for their whole debt.

to be that the circumstance that the creditor has a right to resort to a fund which is open to him alone, shall not preclude him from coming in upon a fund of an insolvent estate which is common to all creditors, and obtaining a dividend on the full amount of his debt, subject to the common sense qualification that the total so received by him shall not exceed the sum due.

There has, indeed, been some difference of authority upon this point. But the case of *Greenwood v. Taylor*,¹ where the doctrine was laid down that the rule in bankruptcy applied also to the administration of insolvent estates, cannot now be considered as law;² and the decisions in the American courts which have assumed the same position, will perhaps be reconsidered when the point comes up again in the tribunals where they were rendered.³ In several of the States the courts have refused to follow that decision.⁴

344. The class of cases which have ordinarily invited the application of the equity of marshalling in this country, is somewhat different from those which have called it into play in England. In England, this equity was most frequently employed in so ordering the claims of creditors entitled to payment out of the real estate of a deceased debtor, as not to interfere with those whose remedy was confined to personalty. Its application to debtors' estates during their lifetime was much less frequent. In the United States, however, the necessity for marshalling the assets of a decedent has been very much, if not altogether, done away with by the general rule that estates of all kinds, both real and personal, are considered assets for the payment of debts, and that specialty and simple contract creditors stand, as respects both classes of property, upon the same footing. But the equity of marshalling has been frequently applied in this country to the adjustment of the liabilities of debtors during their lifetime, and it is now an ordinary part of the machinery by which courts of equity, or courts wherein equitable principles are recognized, arrive at exact justice in the proper application of a debtor's property to the discharge of his liabilities.

¹ 1 Russ. & Myl. 185.

⁴ *West v. The Bank of Rutland*, 19

² *Mason v. Bogg*, 2 My. & Cr. 448.

Verm. 408; *Schunk's Appeal*, 2 Barr,

³ Note to *Aldrich v. Cooper*, 2 Lead. 304; *Findlay v. Hosmer*, 2 Conn. 350.
Cas. Eq. 286.

This equity is enforced for the benefit of junior encumbrancers; as, for example, for the benefit of a mortgagee of a particular piece of real estate, by subrogating him to the general lien of a prior judgment creditor. It is enforced, also, very frequently for the protection of sureties, by enabling them to make use of the creditor's securities as against their principal. The method of applying the doctrine in both these instances has already been explained.

345. The application of this equity to the administration of estates of decedents may be briefly noticed.

According to the law, as it formerly existed in England, the equity of marshalling was frequently exercised in favor of simple contract creditors, when the personalty, which then constituted the only fund for the payment of debts, had been wholly or partially exhausted by superior creditors who might have resorted to real estate, viz., by specialty creditors, by mortgagees, or by vendors claiming a lien for unpaid purchase-money.¹ But in the United States, the property of a decedent, of all kinds, is applicable to the payment of his debts, and the same rule now exists, by statute, in England.² Hence the equity of marshalling is no longer called into play for the purpose of regulating the rights of different sets of creditors of a decedent's estate; but is applied principally, if not altogether, in the settlement of the questions which arise between different claimants to the residuum of the estate after the payment of the debts.³ Questions of this kind arise in this way: The assets of a decedent are not all equally applicable to the payment of his debts, but are liable to be applied only in a certain order, which varies in different States of the Union, being in some rather general, in others strictly defined and minute. Now, it is an almost universal rule that the general personal estate is the primary fund for the payment of debts, and, therefore, ought to be resorted to for that purpose before articles which have been specifically bequeathed are taken. A person, therefore, to whom there has been a specific bequest of a chattel, has a right to say that the

¹ Adams's Eq. 275.

² 2 Redfield on Wills, 853 (§ 74, 1).

³ 3 & 4 Will. IV., c. 104.

general personal estate shall be exhausted in order to pay debts, before recourse is had against his specific legacy; in other words, the assets of a decedent will be marshalled in favor of a specific legacy, and against the general personal estate.

Again, two or more parties interested in an estate may stand exactly upon the same footing, so far as respects the liability of their interests to be taken for the payment of the decedent's debts. Now, if the interest or share of one of these parties is entirely taken, while those of the others are left untouched, he manifestly has, in justice, a right to say that the interests which stand exactly in the same position with his own shall contribute ratably to bear the common burden; in other words, he has an equity for contribution as against his co-legatees.¹

346. The order in which assets are liable to be taken for the payment of debts is generally stated to be as follows: 1. The general personal estate, not expressly or by implication exempted; 2. Any estate particularly devised simply for the payment of debts; 3. Estates descended; 4. Property devised and bequeathed to particular devisees and legatees, but charged with the payment of debts; 5. General pecuniary legacies *pro rata*; 6. Specific legacies, and lands devised; 7. Personalty and realty over which the person whose estate is to be administered has exercised a general power of appointment.²

The general personal estate is, in the first instance, applicable to the payment of debts; and it is also the primary and natural fund for the payment of legacies; and if legacies or annuities

¹ 2 Redfield on Wills, 853, 854 (§ 74, 2). 577; Perry on Trusts, § 566; 2 Spence Eq.

² Smith's Manual of Equity, 270, 271. 817; American note to Duke of Ancaster v. Mayer, 1 Lead. Cas. Eq. 647 (3d Am. ed.). The only exception to this rule appears to be South Carolina, where it is held that property, whether real or personal, which has been specifically set apart by the will for the payment of debts, must be first applied to that purpose. Dunlap v. Dunlap, 4 Desaus. 305; Pinckney v. Pinckney, 2 Rich. Eq. 235; note to Duke of Ancaster v. Mayer, 1 Lead. Cas. Eq. 648 (3d Am. ed.).

See, also, Hoover v. Hoover, 5 Barr, 351; Hays v. Jackson, 6 Mass. 149; Livingston v. Newkirk, 3 Johns. Ch. 812; Miller v. Harwell, 3 Murph. 194; McLoud v. Roberts, 4 Hen. & Munf. 443; Marsh v. Marsh, 10 B. Mon. 360; Chase v. Lockerman, 11 Gill & J. 185; Elliott v. Carter, 9 Grat. 549; Breden v. Gilliland, 17 P. F. Smith, 34; Clarke v. Henshaw, 30 Ind. 144. Snell's Eq. 221; Adams's Eq. 523 (6th Am. ed.) and notes; Story's Eq., §

are given generally, they are payable out of the personal estate only.¹

347. The general personal estate may, however, be exempted from this primary liability, either by express provision in the will, or by implication from the circumstances attending the case.² Although the presumption is against intention to exonerate the personalty, yet where there are express words exempting the personalty, there can, of course, be no question as to its freedom from liability;³ and the rule is the same, where there is on the face of the will a plain intention on the part of the testator to exonerate his personal estate.⁴ In what way, however, this intention can be manifested with sufficient clearness, is, perhaps, a question attended with more difficulty. The primary fund will not be exonerated merely because another fund is provided, for such other fund is considered as auxiliary only, unless the primary fund be expressly exonerated.⁵ The true rule would seem to be that the personal estate will be exempted only when there appears, upon the whole testamentary disposition taken together, an intention on the part of the testator, so expressed as to convince a judicial mind that it was meant not merely to charge the real estate, but so to charge it as to exempt the personal estate; for it is not upon an intention to charge the real, but upon an expressed intention also to discharge the personal estate, that the question is to be decided.⁶ Without entering minutely into the subject it may be stated, as a general rule, that if the personal estate as a whole and not as a residue is given in the nature of a specific bequest, and another fund is supplied for the payment of the debts and

¹ Smith's Manual of Equity, 271; Am. note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. 266 (3d Am. ed.).

² Note to *Duke of Ancaster v. Mayer*, 1 Lead. Cas. Eq. 646 (4th Eng. ed.); *Ollis v. Robins*, 1 De G. & Sm. 131; 2 Jarm. on Wills, 564-600.

³ *Young v. Young*, 26 Beav. 522.

⁴ *Coventry v. Coventry*, 2 Dr. & Sm. 470; *Clery's Appeal*, 11 Casey, 54.

⁵ *Barnewell v. Cawdor*, 3 Mad. 453; *Watson v. Brickwood*, 9 Ves. 447; 2 Spence Eq. 824.

⁶ *Bootle v. Blundell*, 1 Meriv. 230; *Walker's Est.*, 3 Rawle, 229; *Canfield v. Bostwick*, 21 Conn. 550; *Sims v. Sims*, 2 Stock. Ch. 158; Am. notes to *Duke of Ancaster v. Mayer*, 1 Lead. Cas. Eq. 640; and to *Aldrich v. Cooper*, 2 *Id.* 265 (3d Am. ed.). Originally express words were necessary to exempt the personal estate, and almost every judge has lamented that that rule has not been adhered to. 2 Spence Eq. 337.

legacies, and funeral and testamentary charges; or if the testator has, by any declaration in his will, shown an intention to preserve the personal estate entire for any given purpose whatever, that will be sufficient to exempt the personalty.¹

348. The personal estate may also be exonerated by implication, and an instance of such implied exoneration may be found in the case of a mortgage debt not created by the decedent, and which has been held, therefore, under certain circumstances, to be payable not out of the personalty, but out of the mortgaged premises. Thus, if a mortgage had been created by an ancestor, and the mortgaged estate had afterwards descended upon the heir, then the personal estate of the heir would not be liable in favor of any person who should derive title by descent under him to the mortgaged premises, subject to the mortgage.²

349. Where the testator directs a sale of his real estate, and the proceeds and the personal estate are thrown into one mass, which he subjects to the payment of debts and legacies, the real and personal estate must contribute, in proportion to their relative amounts, to the payment of the debts and legacies.³ But if real and personal estate are given together to one person subject to charges, but the real estate is not directed to be sold, the personal estate remains primarily liable.⁴

If the order in which assets should be applied to the payment of debts and legacies has been disturbed, this disturbance may (as has been already stated) be corrected by the application of the doctrine of marshalling. Thus, if pecuniary legacies have been taken for the payment of debts, the legatees are entitled to the equity of marshalling as against real estate descended, or

¹ 2 Spence Eq. 341. See, also, Smith's Manual of Equity, 272; Webb v. Jones, 2 Bro. C. C. 60; Dawes v. Scott, 5 Russ. 32; Forrest v. Prescott, L. R. 10 Eq. 545.

² Duke of Ancaster v. Mayer, 1 Bro. C. C. 454; Cumberland v. Codrington, 3 Johns. Ch. 257; Keyzey's Case, 9 Serg. & R. 71; Garnett v. Macon, 6 Call, 308; Bank of U. S. v. Beverly, 1 How. 134; 1 Lead. Cas. Eq. 642 (3d Am. ed.). If, however, for any reason, the debt becomes the debt of the owner of the land, it must

be paid out of his personalty. Hoff's Appeal, 12 Harris (Pa.), 200; Lennig's Est., 2 P. F. Sm. 139.

³ Roberts v. Walker, 1 Russ. & M. 752; Robinson v. The Governors of London Hospital, 10 Hare, 19.

⁴ Boughton v. Boughton, 1 H. L. Cas. 406; Tench v. Cheese, 6 De G. M. & G. 453 (but see Allan v. Gott, L. R. 7 Ch. App. 439); Williams on Executors, 1712 (7th Eng. ed.). See, also, Elliott v. Carter, 9 Grat. 541; Adams v. Brackett, 5 Met. 280; Cox v. Corkendall, 2 Beas. 138.

as against real estate devised, but charged with the payment of debts. But they have no right to marshal as against lands devised, for the interest of the devisee is not by law liable in priority to that of the legatee.

350. As a general rule, assets will not be marshalled in favor of a charity; the reason being that stated by Lord Hardwicke, in *Mogg v. Hodges*,¹ namely, that a court of equity is not warranted in setting up a rule of equity contrary to the common rules of the court merely to support a bequest which is contrary to law.²

CHAPTER VII.

LIENS.

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| <p>351. Distinction between liens at common law and in equity.</p> <p>352. Instances of equitable liens.</p> <p>353. Vendor's lien for purchase money.</p> <p>354. Nature of this lien.</p> <p>355. Waived by taking independent security.</p> | <p>356. Parties for and against whom the lien exists.</p> <p>357. Deposit of title deeds.</p> <p>358. Mortgages of personalty.</p> <p>359. Pledges.</p> <p>360. Liens in aid of equitable and legal rights.</p> |
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351. A LIEN at common law has been defined to be a right in one man to retain that which is in his possession, belonging to another, till certain demands of him, the person in possession, are satisfied.³ It will be observed that this lien is founded upon the idea of possession; and, consequently, as a general rule, if the possession is abandoned the lien is lost.⁴ It attaches exclusively to personal property.⁵

¹ 2 Ves. Sr. 53.

² Note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. 103 (4th Eng. ed.).

³ Per Grose, J., in *Hammond v. Barclay*, 2 East, 235; 2 Spence Eq. 796.

⁴ 2 Spence Eq. 796. There are certain rare instances in which rights in the nature of liens exist at common law, although the party claiming the right has not the property actually in his possession. An instance may be found in the case

where goods have been deposited by way of security for the payment of a bill of exchange, and the bill is subsequently endorsed; here the endorsee, though he has not possession, may be entitled to the benefit of the security. 2 Spence Eq. 796; *Ex parte Perfect*, 1 Mont. 25; *Ex parte Waring*, 2 Rose, 182; *Ex parte Cope-land*, 3 Deac. & Ch. 199.

⁵ 2 Spence Eq. 796.

Besides the common law liens there are certain liens, or rights in the nature of liens, which are wholly independent of possession,¹ which exist only in equity, and of which equity alone can take cognizance.²

In modern times the doctrine of equitable liens has been liberally extended for the purpose of facilitating mercantile transactions, and in order that the intention of parties to create specific securities may be justly and effectually carried out. A good example of the liens here referred to may be found in the case of *Frith v. Forbes*,³ where bills of exchange drawn against a particular cargo of a ship, accompanied by letters of the consignor to the consignee referring to the bills, were held to create a lien upon the cargo. And while it is true that in a subsequent case⁴ the court declined to accede to the bald proposition, that merely because a bill of exchange purports to be drawn against a particular cargo, it carries a lien on that cargo in the hands of every holder of the bill, and intimated that *Frith v. Forbes* was not to be regarded as of unimpeachable authority, yet that decision may properly be cited as showing the tendency of the modern doctrine upon this subject, and the disposition of the courts of chancery to carry out the contracts of parties as they meant them to be fulfilled.

Other illustrations of such liens will be found in the instances given in a former chapter of the assignments of future cargoes by way of security; the assignments in such cases operating to create liens which could have had no existence at law.⁵

352. Many other instances of equitable liens of a more ancient character exist: such are the lien of a vendor for unpaid purchase-money; of one joint tenant of a lease for fines and expenses of renewal; for improvements which a person has innocently put upon the land of another, being encouraged thereto by the owner; by deposit of title deeds; of a trustee upon the trust estate for his expenses; of a solicitor upon papers or funds;⁶ of

¹ Smith's Manual of Equity, 338.

⁵ *Ante*, pp. 170, 171.

² *Gladstone v. Berley*, 2 Meriv. 403; *Cotesworth v. Stephens*, 4 Hare, 193; 2 Spence Eq. 803.

⁶ See *Francis v. Francis*, 5 De G. M. & G. 108; *Turner v. Letts*, 7 De G. M. & G. 243; *In re Bank of Hindustan*, L. R. 3 Ch. App. 125.

³ 4 De G. F. & J. 409.

⁴ *Robey's Iron Works v. Ollier*, L. R. 7 Ch. App. 695.

a part owner of a ship upon her earnings; and many others.¹ A few of these will require particular attention; and among the first is the lien of the vendor of real estate for the unpaid purchase-money.

353. Where a vendor delivers possession of an estate to a purchaser, without receiving the purchase-money, equity, whether the estate be conveyed or only *contracted to be conveyed*, and although there was not any special agreement for that purpose, gives the vendor a lien upon the land for the unpaid purchase-money.² This has been the settled doctrine of the English courts for many years, having been established by a number of authorities of which the leading one is considered to be *Mackreth v. Symmons*, decided by Lord Eldon in 1808.³ In the United States the decisions upon the subject have not been uniform. In some of the States of the Union, and in the Federal courts, the doctrine of a vendor's lien has been adopted; in others it has been repudiated; while in still a third class, the English rule has been abrogated or modified by statute. In the first class are included the States of New York, New Jersey, Maryland, Tennessee, Mississippi, Georgia, Alabama, Missouri, Michigan, Illinois, Indiana, Ohio, Arkansas, Kentucky, Iowa, Wisconsin, Minnesota, California, Florida, and Texas.⁴ The second class (where the doctrine has been rejected) includes Maine, Pennsylvania, Kansas, North

¹ See 2 Spence Eq. 803; 797.

² 2 Sug. V. and P. 671 (375, Am. ed.).

³ 15 Ves. 329; 1 Lead. Cas. Eq. 336 (3d Am. ed.).

⁴ *Stafford v. Van Rensselaer*, 9 Cowen, 316; *Garson v. Green*, 1 Johns. Ch. 308; *Dubois v. Hull*, 48 Barb. 26; *Armstrong v. Ross*, 5 C. E. Green, 109; *White v. Casanave*, 1 Harr. & J. 106; *Carrico v. The Farmers', etc. Bank*, 38 Maryl. 235; *Ellis v. Temple*, 4 Cold. 315; *Stewart v. Ives*, 1 Sm. & Marsh. 197; *Harvey v. Kelly*, 41 Miss. 490; *Russell v. Watt*, *Id.* 602; *Mims v. Macon and Western Railroad*, 3 Kelly, 333; *Stile v. The Mayor and Council of the City of Griffin*, 27 Geo. 502; *Haley v. Bennett*, 5 Porter, 452;

Dennis v. Williams, 40 Alab. 633; *McKnight v. Brady*, 2 Missouri, 89; *Carroll v. Van Rensselaer*, Harring. Ch. 225; *Sears v. Smith*, 2 Mich. 243; *McLaurie v. Thomas*, 39 Illin. 291; *Evans v. Goodset*, 1 Blackf. 246; *Tiernan v. Bean*, 2 Ohio, 383; *Anketel v. Converse*, 17 Ohio St. 11; *Shall v. Biscoe*, 18 Ark. 142; *Burrus v. Roulhac*, 2 Bush. 39; *Maupin v. McCormick*, *Id.* 206; *Pierson v. David*, 1 Iowa, 23; *McDole v. Purdy*, 23 Iowa, 277; *Tobey v. McAllister*, 9 Wis. 463; *Daughaday v. Paine*, 6 Min. 443; *Truebody v. Jacobson*, 2 Cal. 269; *Burt v. Wilson*, 23 *Id.* 632; *Woods v. Bailey*, 3 Florida, 41; *McAlpine v. Burnett*, 23 Tex. 649.

Carolina and South Carolina;¹ while in Vermont, Virginia, and West Virginia, the lien is abolished by statute.²

In Massachusetts, New Hampshire, Connecticut, and Delaware, the question is undecided.³ In the Federal courts the lien is recognized.⁴

354. As to the exact nature of the vendor's lien the expressions of text writers and judges have not been altogether uniform. By some it has been treated in the nature of a trust, and in the work of at least one great writer this lien is classed under the head of implied trusts.⁵ On the other hand, a somewhat different view is taken by the author of the American note to *Mackreth v. Symmons*;⁶ and this opinion seems to be justified by the language of Mr. Justice Story in *Gilman v. Brown*,⁷ and by the text of a treatise of unsurpassed authority.⁸ It would seem to be plain that this lien is not a trust in the sense of giving the vendor an equitable *title*; but that what he has is a charge or right which has its inception only on bill filed.⁹

355. The lien of a vendor for unpaid purchase-money does not arise, or rather is considered as waived, if a distinct and independent security for the purchase-money is taken. The plainest case, perhaps, is where a mortgage is taken on another estate, the obvious intention of burdening one estate being that the other shall remain free and unincumbered.¹⁰ Any other inde-

¹ *Philbrook v. Delano*, 29 Maine, 410; *Irvine v. Campbell*, 6 Binn. 118; *Stouffer v. Coleman*, 1 Yeates, 393; *Heist v. Baker*, 13 Wright (Pa.), 9; *Simpson v. Munde*, 3 Kansas, 172; *Brown v. Simpson*, 4 *Id.* 76; *Crawley v. Timberlake*, 1 Ired. Eq. 346; *Wynne v. Alston*, 1 Dev. Eq. 163; *Wragg v. Comp. Gen.*, 2 Desaus. 509.

² In Virginia, when no conveyance of the land has been made, the case is not within the statute; *Day v. Hale*, 22 Grat. 163.

³ *Wright v. Dame*, 5 Met. 503; *Arlin v. Brown*, 44 N. H. 102; *Chapman v. Beardsley*, 31 Conn. 115; *Budd v. Busti*, 1 Harr. (Del.) 69.

⁴ *Bayley v. Greenleaf*, 7 Wheat. 46; *Bush v. Marshall*, 6 How. 284; *Chilton v. Braidon*, 2 Black, 458; *Mol.earn v. Mo-*

Lellan, 10 Peters, 640; *Galloway v. Finley*, 12 *Id.* 264.

⁵ Story's Eq., § 1219; See, also, Snell's Principles of Eq. 105; note to 2 Sug. V. and P. 376 (8th Am. ed.). See, also, *Ringgold v. Bryan*, 3 Maryl. Ch. 488; *Moreton v. Harrison*, 1 Bland, 491; and *Iglehart v. Armiger*, *Id.* 519, 524, 525.

⁶ 1 Lead. Cas. Eq. 373.

⁷ 1 Mason, 191. "It (the lien) is not therefore an equitable estate in the land itself, although that appellation is loosely applied to it." See 4 Wheat. 292, note.

⁸ Sug. V. and P. 379 (8th Am. ed.).

⁹ See 1 Lead. Cas. Eq. 366 (Am. note.)

¹⁰ By the Master of the Rolls in *Nairn v. Prowse*, 6 Ves. 752, 760. See, however, *Boos v. Ewing*, 17 Ohio, 500; *Anketel v. Converse*, 17 Ohio St. 11.

pendent security, as, for example, a pledge of stock, a mortgage on the land sold, or the like, would have the same effect.¹ But the taking of such independent security, although evidence of a waiver, is not conclusive evidence.²

But a mere personal security, as, for example, a bond, or a bill, or a promissory note, will not of itself operate as a waiver of the lien.³ Where, however, the bill or note is taken as *payment* of the consideration money, in other words, where the security was in fact the thing bargained for, the lien is gone.⁴ And where the vendor takes a negotiable note drawn by a third person and endorsed by the purchaser, or drawn by the purchaser and endorsed by a third person, the presumption of the lien is thereby repelled.⁵

Where the conveyance is made in consideration of the covenants entered into by the same deed for the payment of the price, there is no room for any *implied* security, and hence no vendor's lien will arise.⁶

356. As to the parties for and against whom the vendor's lien exists, it may be remarked, in the first place, that the lien will exist in favor of a legatee (for example) whose legacy has been taken to pay for the purchase of an estate in the hands of the heir; in other words, the purchased estate and the personal estate will be marshalled.⁷ The lien is enforceable against all

¹ *Nairn v. Prowse*, 6 Ves. 752; *Richardson v. Ridgely*, 8 Gill & J. 87; *White v. Dougherty*, 1 Martin & Y. 309; *Young v. Wood*, 11 B. Mon. 123; *Mattix v. Weand*, 19 Ind. 151; *Harris v. Hurlan*, 14 *Id.* 439; *Shelby v. Perrin*, 18 Tex. 515; *Camden v. Vail*, 23 Cal. 633; *Hadley v. Pickett*, 25 Ind. 450; *Mims v. Macon, etc. R. R. Co.*, 3 Kelly, 333; *Little v. Brown*, 2 Leigh, 353; *Brown v. Gilman*, 4 Wheat. 291; *Fish v. Howland*, 1 Paige, Ch. 30; *Phillips v. Saunderson*, 1 Sm. & Marsh. Ch. 462.

² *Manly v. Slason*, 21 Verm. 271; *Mackreth v. Symmons (supra)*, 2 Sug. V. and P. 386, notes.

³ *Collins v. Collins*, 31 Beav. 346; *Hughes v. Kearney*, 1 Sch. & Lef. 134; *White v. Williams*, 1 Paige, 502; *Garson v. Green*, 1 John. Ch. 308; *Mims v. Ma-*

con Railroad Co., 3 Kelly, 333; *Baum v. Grigsby*, 21 Cal. 172; *Thornton v. Knox*, C. B. Mon. 74; *Pinchain v. Collard*, 13 Tex. 333; *Manly v. Slason*, 21 Verm. 271; *Van Doren v. Todd*, 2 Green Ch. 397; *Tobey v. McAllister*, 9 Wis. 463; *Hoggatt v. Wade*, 10 Sm. & Marsh. 143; note to *Mackreth v. Symmons*, 1 Lead. Cas. Eq. 365.

⁴ *Buckland v. Pocknell*, 13 Sim. 406.

⁵ 2 Sug. V. and P. 386, note k, and cases cited.

⁶ *Clarke v. Royle*, 3 Sim. 499; *Earl of Jersey v. Dock Co.*, L. R. 7 Eq. 409; 2 Sug. V. and P. 381 (8th Am. ed.). See *Winter v. Lord Anson*, 1 Sim. & St. 434; 3 Russ. 488.

⁷ *Austen v. Halsey*, 6 Ves. 475; *Cheeseborough v. Millard*, 1 Johns. Ch. 412; *Iglehart v. Armiger*, 1 Bland, 519.

persons claiming under the vendee with notice, although for a valuable consideration,¹ but not as against a *bond fide* purchaser without notice.²

In the American note to *Mackreth v. Symmons*, it is said that the vendor's lien does not necessarily prevail over that of judgment creditors of the vendee, but that "it depends upon the relative equities and rights of the disputants, in comparison with one another;"³ and that "lien creditors will supplant one who, though he had a right in equity to charge the land, through his own *laches* and default failed to secure a lien."⁴ Mr. Justice Story, however, in his *Commentaries on Equity Jurisprudence*, says that the lien of a vendor "will prevail against the judgment creditor of a vendee before an actual conveyance of the estate has been made to him, and as it should seem also against such a judgment creditor after the conveyance."⁵ But while, so far as those cases in which there has been no conveyance are concerned, it must be remembered that the right of a vendor is not a mere lien, but an *estate*, and it is difficult to see how that legal *estate* can be postponed to a mere charge against the equitable estate of the vendee; yet when there has been an actual conveyance of the legal title, it is equally difficult to see why the claims of creditors should be postponed to a secret encumbrance which the vendor has failed to render secure. It has, therefore, been held in several cases that the vendor's lien will not prevail against judgment creditors, or against purchasers under an execution sale;⁶ and the language of the court in *Bayley v. Greenleaf*⁷ is certainly in favor of the creditors. There are, however, some decisions the other way.⁸

An equitable mortgage created by the purchaser, by a deposit

¹ *Mackreth v. Symmons*, 15 Ves. 329; *Meigs v. Dimock*, 6 Conn. 458; *Stafford v. Van Rensselaer*, 9 Cowen, 316; *Magruder v. Peter*, 11 Gill & J. 217; *Redford v. Gibson*, 12 Leigh, 332; *Mounce v. Byars*, 16 Geo. 469; *Cox v. Fenwick*, 3 Bibb, 183; *Williams v. Roberts*, 5 Ohio, 35; 2 Sug. V. and P. 393.

² *Bayley v. Greenleaf*, 7 Wheat. 46; *Schwarz v. Stein*, 29 Maryl. 112. See, however, *Day v. Hale*, 22 Grat. 163.

³ 1 Lead. Cas. Eq. 374.

⁴ *Id.*

⁵ Story's Eq. Jurisp., § 1228.

⁶ *Johnson v. Cawthorn*, 1 Dev. & Bat. Eq. 32; *Harper v. Williams*, *Id.* 379; *Crawley v. Timberlake*, 1 Ired. Eq. 346; *Roberts v. Rose*, 2 Humph. 145, 147; *Hall v. Jones*, 21 Maryl. 439.

⁷ 7 Wheat. 46.

⁸ *Aldridge v. Dunn*, 7 Blackf. 249; *Parker v. Kelly*, 10 Sm. & Marsh. 184.

of title deeds in favor of a person who takes *bonâ fide*, and without notice, will give the latter a preferable equity, which will overreach the vendor's lien on the estate for any part of the purchase-money.¹

Persons coming in under the purchaser by act of law, as assignees of a bankrupt, are bound by the lien; although they had no notice of it.²

The purchaser of an estate who has paid part of the purchase-money, has a lien on it to that extent if the vendor cannot make title.³

357. The next equitable lien which deserves consideration is that which grows out of a deposit of title deeds. The *primâ facie* effect of such a deposit would seem to be simply to create a lien upon the title deeds deposited, in the nature of a solicitor's lien upon papers in his possession; but it has been decided in England and in some of the United States, that the deposit will not operate merely to create a lien upon the papers, but will enure as a charge upon the land itself in the nature of a mortgage. The first case in England in which this doctrine seems to have been authoritatively settled was *Russel v. Russel*, decided by Lord Thurlow in 1783;⁴ and this decision, though strongly disapproved, has, nevertheless, been recognized by many cases as a binding authority;⁵ and the doctrine may, therefore, be considered as well established in spite of its apparent infringement upon the Statute of Frauds.⁶

While the effect of a deposit of title deeds in creating a lien upon the estate may be considered as definitely settled, the

¹ 2 Sugden V. and P. 396 (8th Am. ed.); *Rice v. Rice*, 2 Drew. 73; *Schwarz v. Stein*, 29 Maryl. 112. See *Pierce v. Milwaukee and St. Paul R. R. Co.*, 24 Wis. 551, where a mortgage of subsequently acquired real estate was held to be a lien thereon in preference to the lien of the vendor of the real estate.

² 2 Sug. V. and P. 395.

³ *Rose v. Watson*, 10 H. L. Cas. 672; *Aberaman Iron Works v. Wickens*, L. R. 4 Ch. App. 101; 2 Sug. V. and P. 379.

⁴ 1 Bro. C. C. 269; 1 Lead. Cas. Eq. 541.

⁵ See *Ex parte Coming*, 9 Ves. 115; *Pryce v. Bury*, 2 Drew. 42; *Fenwick v. Potts*, 8 De G. M. & G. 506; *Daw v. Terrell*, 33 Beav. 218; 1 Lead. Cas. Eq. 543.

⁶ See *Pryce v. Bury*, 2 Drew. 42; *Ferris v. Mullins*, 2 Sm. & Giff. 378; and the remarks of Lord Abinger, in *Keys v. Williams*, 3 Y. & C. Ex. Ca. 55, 61. See *Dixon v. Muckleston*, L. R. 8 Ch. App. 155, where the deeds were accompanied by a letter which took the case out of the statute.

ascertainment of the exact manner in which it operates is not unattended with difficulties. It has been decided that no agreement to execute a formal mortgage can be implied from such a deposit;¹ and it has also been held that an agreement to give a legal mortgage, accompanied by a deposit of the title deeds for the purpose of preparing such a mortgage, will not constitute a valid equitable mortgage.² On the other hand, a different conclusion from that reached in *Norris v. Wilkinson* was arrived at in several cases, and the balance of authority is, perhaps, in favor of the proposition that a delivery of deeds for the purpose of preparing a legal mortgage constitutes a valid equitable mortgage.³ Whether an equitable mortgage can be implied from the simple fact, without more, of the adverse possession of title deeds seems to be doubtful.⁴

The security by deposit of title deeds has been held to extend to subsequent advances made upon the understanding that they were to be secured by the deposit.⁵

The only remaining points upon this subject that seem to require to be stated are that a lien may be created by the deposit of *part* only of the title deeds;⁶ that it will be a charge only upon the interest of the party making the deposit;⁷ and that the mortgagee's appropriate remedy is foreclosure.⁸

Mortgages by deposit of title deeds have been sustained in several States of the Union, although they have not been of frequent occurrence.⁹ They have been disapproved of in Ken-

¹ *Sporle v. Whayman*, 20 Beav. 607.

² *Norris v. Wilkinson*, 12 Ves. 192; *Ex parte Hooper*, 1 Meriv. 7; *Ex parte Pearse*, 1 Buck, 525.

³ See *Edge v. Worthington*, 1 Cox, Ch. 211; *Ex parte Bruce*, 1 Rose, 374; *Hockley v. Bantock*, 1 Russ. 141; *Keys v. Williams*, 3 Young & Col. Ex. Ca. 55; 1 Lead. Cas. Eq. 547.

⁴ See *Ex parte Coming*, 9 Ves. 115; *Chapman v. Chapman*, 13 Beav. 308; *Smith v. Constant*, 4 De G. & Sm. 213; *Burgess v. Moxon*, 2 Jur. N. S. 1059.

⁵ *Ex parte Kensington*, 2 V. & B. 69; *James v. Rice*, 5 De G. M. & G. 461; 1 Lead. Cas. Eq. 545.

⁶ See *Ex parte Chippendale*, 1 Deac. 57;

Lacon v. Allen, 3 Drew. 579; *Roberts v. Croft*, 2 De G. & J. 1.

⁷ *Williams v. Medlicot*, 6 Price, 495; *Turner v. Letts*, 20 Beav. 185.

⁸ *Redmayne v. Forster*, L. R. 2 Eq. 467; though see *Tuckley v. Thompson*, 1 Johns. & H. 126.

⁹ *Rockwell v. Hobby*, 2 Sand. Ch. 9; *Chase v. Peck*, 21 N. Y. 587; *Stoddard v. Hart*, 23 N. Y. 561; *Welsh v. Usher*, 2 Hill (Ch.) 167; *Williams v. Stratton*, 10 Sm. & Marsh. 418; *Mounce v. Byars*, 16 Georgia, 469; *Robinson v. Urquhart*, 1 Beas. 515; *Hackett v. Reynolds*, 4 R. Island, 512; *Jarvis v. Dutcher*, 16 Wis. 307; *Richards v. Leaming*, 27 Ill. 431; *Keith v. Horner*, 32 Id. 524.

tucky,¹ and rejected in Pennsylvania² and Ohio.³ In Vermont the question is undecided.⁴ In quite a number of cases agreements to give a mortgage have been held to create a lien.⁵

358. The next class of liens requiring attention are those which grow out of mortgages and pledges of personalty.

It has been stated in a former chapter that mortgages of personalty resemble, in most respects, mortgages of realty; so far, at all events, as the existence of the equity of redemption and of the remedy by foreclosure are concerned.⁶ There is, however, this distinction between mortgages of real and personal property, namely, that while in the former a foreclosure suit is necessary in order to enable the mortgagee to sell, in the latter a sale may be had without the necessity of filing a bill. After breach of condition, and upon giving due notice, the mortgagee of personalty may sell the property mortgaged, as he could at civil law; and the title, if the sale is made *bonâ fide*, will vest absolutely in the vendee.⁷

It may also be observed that just as absolute sales of personal property to be acquired *in futuro*, which would not have been considered good under the strict rules of common law, may be sustained in equity; so, also, mortgages of similar property, which would not be recognized in courts of law, may be upheld in courts of chancery. Thus the case of *Holroyd v. Marshall*,⁸ referred to in a former chapter,⁹ was the case of a mortgage (*inter alia*) of personalty which did not come into the possession of the mortgagor until after the date of the mortgage. Such a transfer would be invalid according to the strict doctrine of the common law, but is now thoroughly recognized in courts of

¹ *Vanmeter v. McFaddin*, 8 B. Mon. 435.

² *Bowers v. Oyster*, 3 Pen. & Watts, 239; *Shitz v. Dieffenbach*, 3 Barr, 233; *Edward's Exrs. v. Trumbull*, 14 Wright (Pa.), 509.

³ *Probasco v. Johnson*, 2 Disney, 96.

⁴ *Bicknell v. Bicknell*, 31 Verm. 498.

⁵ See *Read v. Simons*, 2 Desaus. 552; *Matter of Howe*, 1 Paige, 125; *Bank of Muskingum v. Carpenter*, 7 Ohio, 21; and other cases cited at the conclusion of

Am. note to Russel v. Russel, 1 Lead. Cas. Eq. 666.

⁶ *Ante*, Part I., Chap. VII., p. 166, note 3.

⁷ *Tucker v. Wilson*, 1 P. Wms. 261; *Hart v. Ten Eyck*, 2 Johns. C. R. 100; *Parker v. Brancker*, 22 Pick. 46; *De Lisle v. Priestman*, 1 P. A. Browne, 176; *Doane v. Russell*, 3 Gray, 382; *Story's Eq. Jurisp.* § 1031.

⁸ 10 H. L. Cas. 209.

⁹ *Ante*, p. 170.

equity; and mortgages, or charges in the nature of mortgages, upon personal property which is not already *in*, but is to come *into*, the possession of the mortgagor, are of not unfrequent occurrence in modern times, and are constantly upheld.¹ It is true, that, according to the rule established in *Twyne's Case*,² transfers of personal property, unaccompanied by the delivery of possession, are to be considered fraudulent and void as against the creditors of the assignor; but even under the rule thus laid down it has been held that an exception exists in favor of articles which, at the time of the sale, are not susceptible of actual delivery, as, for example, merchandise at sea, or in the hands of a third person.³ Therefore it is no objection to a mortgage of property to be acquired *in futuro* that it is not delivered at once and is therefore liable to the rule in *Twyne's Case*, for the obvious reason that it falls entirely outside of the doctrine there enunciated. Indeed, the tendency in equity is not to regard the delivery of possession of personal property as always essential to a valid mortgage of the same;⁴ and hence mortgages of certain kinds of personal property, as, for example, of the rolling stock of a railroad, are of frequent occurrence. Such mortgages are, in many States, allowed and regulated by statute; but the same end is also attained through the modern equitable doctrines in regard to mortgages of personal property.⁵

359. Between a *mortgage* of personal property, and a *pledge* thereof, there are one or two points of difference of considerable importance. "A mortgage," it was said in *Jones v. Smith*,⁶ "is a pledge and more, for it is an absolute pledge to become an absolute interest if not redeemed at a certain time."

A pledge, therefore, differs on the one hand from a lien, which

¹ See *ante*, p. 170 *et seq.*

² 1 Sm. Lead. Cas. 33.

³ Notes to *Twyne's Case*, 1 Sm. Lead. Cas. 33.

⁴ *Walcott v. Keith*, 2 Foster, 196; *Whittle v. Skinner*, 23 Verm. 531.

⁵ See *Philadelphia, etc. R. R. Co. v. Woelpper*, 14 P. F. Sm. 372; *Ladley v. Creighton*, 20 *Id.* 494; *Morrill v. Noyes*, 56 Maine, 465; 2 Redfield on Railways, 501, 508. In England liens are fre-

quently created by debentures upon the "undertaking" of a company, by which the debenture holder acquires a charge upon all the property of the company past and future, which he can enforce upon filing a bill, and which will entitle him to priority if the company is wound up. See *In re Panama, etc. Royal Mail Company*, L. R. 5 Ch. App. 318.

⁶ 2 Ves., Jr. 372.

confers no right to sell, but only a right to retain until the debt in respect of which the lien was created has been satisfied;¹ and, on the other hand, from a mortgage, which conveys the entire property of the thing mortgaged to the mortgagee conditionally, so that when the condition is broken the property remains absolutely in the mortgagee, whereas a pledge never conveys the general property to the pledgee, but only a special property in the thing pledged.²

According to the modern authorities, the remedy of the pledgee is twofold; he may either file a bill in chancery in the nature of a foreclosure bill, and proceed to a judicial sale; or he may sell without judicial process upon giving reasonable notice to the pledgor to redeem, and of the intended sale.³ It had, in former times, been the rule of common law, that the pledgee was obliged to have recourse to the process of law to call upon the pledgor to redeem; and that the right of redemption could not be destroyed by anything short of a judicial sale;⁴ but the rule now appears to be settled in favor of the right of the pledgee to sell upon notice, without resorting to a foreclosure bill. The right to sell upon notice, however, is one in the exercise of which a great deal of care is required; and the pledgee may be held responsible if he does not strictly follow all the requirements of the law by which this right is fenced in.⁵ The safer course in all cases would, therefore, be to file a bill, and obtain an order for a judicial sale.

It has been held that a court of equity will entertain a bill by the pledgor to compel a delivery of the pledge after the debt is

¹ *Thames Iron Works Co. v. The Patent Derrick Co.*, 1 Johns. & H. 93.

² *American note to Coggs v. Bernard*, 1 Sm. Lead. Cas. 384.

³ *Stearns v. Marsh*, 4 Denio, 227; *Davis v. Funk*, 8 Wright (Pa.), 243; *Diller v. Brubaker*, 2 P. F. Sm. 502; *Tucker v. Wilson*, 1 P. Wms. 261; *Lockwood v. Ewer*, 9 Mod. 278; *Pigot v. Curbey*, 15 C. B. (N. S.) 701, and note by the American editor; *Wothington v. Tormey*, 34 Maryl. 182; *Strong v. Nat. Mech. Bank Ass.*, 45 N. Y. 718; note to *Coggs v. Ber-*

nard, 1 Smith's Lead. Cas. 384; *Story on Bailments*, §§ 308, 310; 2 Kent's Com. 582.

⁴ *Story on Bailments*; 2 Kent's Com., *ut sup.*

⁵ As to the damages for a wrongful sale by the pledgee, see *Johnson v. Stear*, 15 C. B. (N. S.) 330, and note by the American editor. See, also, *Donald v. Suckling*, L. R. 1 Q. B. 585; *Halliday v. Holgate*, L. R. 3 Exch. 299; *Fisher v. Brown*, 104 Mass. 259.

paid;¹ and while it may be doubted whether under ordinary circumstances the remedy at law might not be adequate, yet it is clear that where the case involves questions of account, and the ascertainment of indefinite charges, a bill in equity is the proper remedy.²

360. Before leaving the subject of the present chapter it may be remarked that a court of chancery in enforcing equitable titles or equitable rights not unfrequently makes use of the doctrine of liens in order to render the relief afforded more effective. To give but a single instance. The doctrine of marshalling assets and securities results sometimes in the substitution of one party to the lien to which another had been entitled.

Thus in a modern case a firm in Ceylon consigned coffee to a firm in England, by whom the coffee, together with certain other securities of their own, was pledged to their broker to secure a debt. The English firm having become insolvent, the broker sold the coffee, and enough of the other securities to satisfy his debt; and it was held that the Ceylon firm were entitled as against the English firm in liquidation to have the remaining securities in the broker's hands marshalled, and to have a lien thereon for the balance due them in the coffee transaction.³ So, also, a court of chancery will lend its assistance to the enforcement of a legal lien. Thus in *Schotsmans v. Lancashire Railway Company* a bill was filed to protect a vendor's right of stoppage *in transitu*; and although under the facts of the case the bill was dismissed, yet the right to bring such a bill was expressly recognized by the court.⁴

¹ *Brown v. Runals*, 14 Wis. 693.

³ *Ex parte Alston*, L. R. 4 Ch. App. 168.

² *Conyngham's Appeal*, 7 P. F. Sm. 474;
White Mts. R. R. v. Bay State Iron Co.,
50 N. Hamp. 57; *Merrill v. Houghton*,
51 *Id.* 61 (a bill to redeem stock).

⁴ *Schotsmans v. Lancashire Railway Co.*
L. R. 2 Ch. App. 332.

PART III.

EQUITABLE REMEDIES.

CHAPTER I.

SPECIFIC PERFORMANCE.

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| 361. General nature of this equitable remedy. | 380. Other rules as to title. |
| 362. Inadequacy of common law remedies. | 381. Parol variations of written contracts; <i>Townshend v. Stangroom</i> . |
| 363. Other grounds of the superiority of the remedy in equity. | 382. Authorities in the United States. |
| 364. Contracts for the sale of real estate. | 383. Statute of Frauds; exceptions. |
| 365. May be enforced between original parties, and those who claim under them. | 384. Part performance. |
| 366. May be enforced as to real estate outside of the jurisdiction. | 385. What constitutes part performance. |
| 367. Covenants for further assurance. | 386. When the reduction of the contract to writing is prevented by fraud. |
| 368. Personal property. | 387. When the parol contract is admitted in the answer. |
| 369. When damages cannot be ascertained. | 388. Specific performance with compensation for defects. |
| 370. Other contracts. | 389. When the purchaser may be compelled to take. |
| 371. Specific performance rests on discretion of the court. | 390. When he may elect to take; limitations upon this doctrine. |
| 372. Contract must be founded on a valuable consideration. | 391. Time to make out a title beyond the day. |
| 373. Meritorious considerations. | 392. Due diligence required. |
| 374. Adequacy. | 393. Rule altered by express stipulations, or by presumptions growing out of the nature of the contract. |
| 375. Performance in specie must be necessary. | 394. Surrounding circumstances. |
| 376. Must be in accordance with general equitable doctrines. | 395. Compensation; <i>Sir Hugh Cairns's Act</i> . |
| 377. Contract must be mutual, certain, and practicable. | 396. Doctrine in the United States. |
| 378. Purchaser not compellable to accept a doubtful title. | 397. Parties compelled to make good their representations. |
| 379. <i>Pyrke v. Waddingham</i> . | 398. Enforcing negative covenants. |

361. It is one of the characteristic features of the relief afforded by courts of equity, that the effort always is to put the complainant in exactly the position he would have occupied had it

not been for the wrongful act of the defendant; and in no head of chancery jurisdiction is this more strikingly exemplified than in the Equitable Remedy of Specific Performance of Contracts and Duties.

This remedy is one of the very earliest heads of the extraordinary jurisdiction of the High Court of Chancery, as will be seen by reference to the authorities from the Chancery Calendar, cited in the Introduction;¹ and not only is it one of the most ancient, but it has been found also to be one of the most useful of equitable means of redress, and has continued to be uninterruptedly applied by courts of general equity powers down to the present day. The effectiveness, moreover, of the relief thus afforded by the Court of Chancery in England, has been still further enhanced, of late years, by the authority conferred by statute to give compensation in addition to, or in lieu of the remedy by specific performance, as will be seen further on.²

362. The reasons for the original growth and subsequent exercise of this equitable remedy are obvious. At common law the general rule was (following the civil law maxim, *nemo precise cogi ad factum*), to give only pecuniary damages as a redress for all injuries, whether the injury resulted from a refusal to fulfil a contract to deliver property of the defendant, or from a wrongful detention of property of the plaintiff; in other words, whether the action sounded in contract or in tort.³ Land, indeed, belonging to the plaintiff could be specifically recovered; but a contract to sell real estate could not be specifically enforced by any common law action.⁴ And, so far as personal property was concerned, the rule stated above was subject to but two exceptions, viz., *detinue* and *replevin*. But in *detinue* the defendant could wage his law; and the action of *replevin* lay only for the taking of goods under a wrongful distress, and did not, in England, reach other cases; although in some of the United States it has been extended so as to embrace all kinds of wrongful taking

¹ *Kymburley v. Goldsmith*, Chan. Cal. xx. Introduction, p. 10, *ante*. See, also, 1 Spence Eq. 645.

² Stat. 21 & 22 Vic., c. 27 (Sir Hugh Cairns's Act); *post*, p. 361.

³ Fry on Specific Performance, §§ 1, 11.

⁴ The remedy by action for a breach of the contract in such a case was extremely inadequate; see 1 Sugden V. and P. 542 (8th Am. ed.); *ante*, Introduction, p. 25.

of personalty, and in others, it has a still more general application, and is used wherever one man claims goods in the possession of another, and seeks to recover them specifically.¹ But the common law remedy by damages was in many instances manifestly inadequate; for while it was truly said that "one shilling or one sovereign was as good as another,"² and that the money which a plaintiff might recover as damages for the non-delivery of a lot of merchandise would enable him to purchase other articles of exactly the same kind and quality, yet this rule is plainly not true in all cases. Thus a particular house or a particular piece of land may have peculiar advantages of location and vicinage, which no other house or piece of land would or could possess, and which no money could, of course, obtain. So, also, there may be many personal chattels which have either a *pretium affectionis*, or a value from some other peculiar cause, and for the loss of which, therefore, pecuniary damages would be an utterly inadequate compensation to the owner; and some cases, moreover, may exist in which it would be entirely impossible to estimate the damages, for the detention of property, by any known common law rules.

363. Other reasons, also, exist for invoking the jurisdiction of a chancellor.

At common law one party to a contract cannot complain of a breach on the part of the other, unless he can show his own compliance with the terms of the agreement in every particular. But in equity specific performance may be decreed, although the complainant may not be able to fulfil his contract to the letter, and this is done by entering a decree with compensation for defects.³ So, too, time is in equity not generally regarded as of the essence of a contract, and failure on the part of the complainant to comply with his covenants on the exact day will not necessarily disentitle him to relief.⁴ When to the above is added the circumstance that equity will decree specific performance of a contract on the ground that it has been already so far performed that it would be inequitable to rescind the same, in many cases in which relief would be denied in a court of law, the ad-

¹ 2 Black. Com. 146; Sharswood's note.

³ Fry on Spec. Perf., § 4.

² Fry on Spec. Perf., § 11.

⁴ *Id.* § 709.

vantages of the equitable over the legal remedy, and the reasons for its exercise, can be, perhaps, properly appreciated.

364. From the above general observations it will be perceived that the inadequacy of pecuniary damages or the impossibility of estimating them, form the main grounds upon which the equitable remedy of specific performance may be invoked. It will be convenient to give a few instances of both.

The remedy of specific performance is most frequently applied to contracts for the sale of real estate. When a binding agreement is entered into to sell land, equity regards the vendor as a trustee of the legal title for the benefit of the vendee, while the latter is looked upon as a trustee of the purchase-money for the benefit of the former.¹ Hence the purchaser has a right to the aid of the chancellor for the purpose of obtaining a conveyance of the legal title to the property of which he is the equitable owner; while, as all remedies ought to be mutual, the vendor can invoke the same aid for the purpose of compelling the buyer to accept a conveyance, and pay the purchase-money. If the contract has been partly performed by the vendee's going into possession or paying the purchase-money,² the equity of both parties is of course still stronger. Hence it may be said that the circumstance that the contract concerns realty, gives the party a *prima facie* right to come into equity.³ This right, however, is controlled, in particular instances, by other equitable considerations presently to be noticed.

It may be well to note here that the right of a vendor who has put a purchaser in possession before conveyance, but has not received the purchase-money, must not be confounded with the vendor's lien for purchase-money after conveyance. The latter

¹ Richter v. Selin, 8 Serg. & R. 425. Kerr v. Day, 2 Harris (Pa.), 114; Finley v. Aiken, 1 Grant's Cas. (Pa.) 83; Malin v. Malin, 1 Wend. 625; McKechnie v. Sterling, 48 Barb. 330; King v. Ruckman, 6 C. E. Green, 599; Haughwout v. Murphy, 7 Id. 531, 546; McCreight v. Foster, L. R. 5 Ch. App. 612. A loss by fire, after the contract, will fall on the purchaser; Robb v. Mann, 1 Jones (Pa.), 300; McKechnie v. Sterling; 48 Barb.

330; Hill on Trustees, 272 (4th Am. ed.); 1 Sug. V. and P. 270, and note (8th Am. ed.); American note to Seton v. Slade, 2 Lead. Cas. Eq., part ii., 74.

² It is not meant to be here asserted that payment of the purchase-money is such a part performance as will take the case out of the statute of frauds; see *infra*, p. 355.

³ Specific performance will not be decreed for a tenancy from year to year; Clayton v. Illingworth, 10 Hare, 451.

is simply a charge upon the legal estate in the hands of the purchaser; whereas, in the former case, the legal estate remains in the vendor. This distinction is important; and is the more so, as it has been, in some cases, neglected in this country.¹

365. Contracts relating to realty may be enforced not only between the original parties, but also between any persons claiming under them in privity of estate, representation, or title, unless controlling equities have intervened.² The personal representatives of the deceased vendor may require a conveyance of the real estate to be made as against the heir and the vendee; and on the other hand, the heir of the vendee is entitled to have the personalty of the estate applied to the purchase for his benefit.³

Where a contract has been entered into for the sale of property, and that property is afterwards aliened, or assigned, or contracted to be aliened or assigned, and the alienee or assignee has notice of the original contract, he is liable to its performance at the suit of the purchaser. If the contract is a binding one, it can be enforced against any party in whom is vested the legal and beneficial interest in the property.⁴ On the other hand, if the purchaser assigns the contract, the assignee, upon payment of the purchase-money, can compel the vendor to complete the contract and convey the title to him.⁵ But it would seem that it is the duty of the assignee of such a contract to intervene actively, to file a bill, and to claim the benefit of the contract

¹ See American note to *Mackreth v. Symmons*, 1 Lead. Cas. Eq. 373 *et seq.* is regulated in most of the United States by statute.

See, however, *Hall v. Jones*, 21 Maryl. 439.

² *Hoddel v. Pugh*, 33 Beav. 489; *Baden v. The Countess of Pembroke*, 2 Vern. 212; *Newton v. Swazey*, 8 N. Hamp. 9; *Ewins v. Gordon*, 49 *Id.* 444; *Ambrouse's Heirs v. Keller*, 22 Grat. 769; *Glaze v. Drayton*, 1 Desaus. 109; *Hays v. Hall*, 4 Port. 374; *McMorris v. Crawford*, 15 Alab. 271; *Nesbit v. Moore*, 9 B. Mon. 508; *Tiernan v. Roland*, 3 Harris (Pa.), 429; *Laverty v. Moore*, 33 N. Y. 658; *Fry on Spec. Perf.* § 115; 1 Sug. V. and P. 292, 293 (8th Am. ed.).

³ The subject of the performance of contracts of decedents concerning realty

⁴ *Daniels v. Davison*, 16 Ves. 249; 17 *Id.* 433; *Saunders v. Cramer*, 3 Dr. & W. 99; *Barnes v. Wood*, L. R. 8 Eq. 424; *Fenwick v. Bulman*, L. R. 9 Eq. 165; *Fry on Spec. Perf.*, § 135. See, also, *Champion v. Brown*, 6 Johns. Ch. 398; *Muldrow v. Muldrow*, 2 Dana, 386; *Hampson v. Edelen*, 2 Har. & Johns. 64; *Hoagland v. Latourette*, 1 Green Ch. 254; *Haughwout v. Murphy*, 7 C. E. Green, 547; *Langdon v. Woolfolk*, 2 B. Mon. 105.

⁵ *Champion v. Brown*, 6 Johns. Ch. 398; *Story's Eq.*, § 788; *Sugden V. and P.* 270 (8th Am. ed.).

in such a way that the court may have an opportunity of dealing with the rights of all the parties interested. Such was the decision in *M'Creight v. Foster*;¹ where an owner of leaseholds (Foster) had contracted to sell them to one Pooley, who paid certain instalments, and afterwards assigned the benefit of the contract to a company. The company gave notice to Foster; but Foster subsequently closed the transaction with Pooley, receiving from him the balance of the purchase-money, and completing the assignment. Pooley afterwards conveyed to a *bonâ fide* purchaser without notice, and the official liquidators of the company then filed their bill against Foster, claiming that he was liable to make good the loss occasioned by his completion of his contract with Pooley, after he had received notice from the company. It was held by Lord Chancellor Hatherley, reversing the decision of Lord Romilly, M.R., that Foster was not liable. The ground of this decision was that the vendor is not to be considered as a complete trustee of the legal title until the whole purchase-money is paid; and that in the mean time no amount of notice can deprive him of his right to go on and enforce his bargain with the original purchaser.²

366. It is no objection to a bill for specific performance that the real estate lies out of the jurisdiction of the court. If the parties are within the jurisdiction, relief can be given, for equity always acts *in personam*.³ Thus, in *Massie v. Watts*, the Supreme Court of the United States sustained a bill filed in the Circuit Court of Kentucky, to compel a conveyance of land situated in Ohio; while in *Penn v. Lord Baltimore*, Lord Chancellor Hardwicke decreed the specific performance of the articles of agreement between the complainant and the defendant, touching the boundaries between the colonies of Pennsylvania and Maryland.⁴

367. In addition to decreeing the performance of a contract

¹ L. R. 5 Ch. App. 604.

² See the argument of Sir Roundell Palmer, L. R. 5 Ch. App. 609; and the opinion of the Chancellor, *Id.* 612.

³ *Massie v. Watts*, 6 Cranch, 148; *Brown v. Desmond*, 100 Mass. 267; *Cleveland v. Burrill*, 25 Barb. 532; *Burrell v. Root*, 40 N. Y. 496; *Great Falls*

Manuf. Co. v. Worster, 3 Foster, 462; *Stephenson v. Davis*, 56 Maine, 73; *Davis v. Headley*, 7 C. E. Green, 115; *Penn v. Lord Baltimore*, 1 Ves., Sr. 444; 2 Lead. Cas. Eq. 767; *Fry on Spec. Perf.*, § 60; 1 Sug. V. and P. 305 (8th Am. ed.).

⁴ *Massie v. Watts*, 6 Cranch, 148; *Penn v. Lord Baltimore*, 1 Ves., Sr. 444.

to convey real estate, equity will also lend its aid to the specific enforcement of the covenant for further assurance ; although, as a general rule, equity will not specifically enforce covenants for title except in bills *quia timet*, such as bills to remove a cloud from a title, and the like. The enforcement of a covenant for further assurance, however, would seem to rest very much upon the same grounds as the right to enforce the original agreement to convey ; and, therefore, if the purchaser finds that other conveyances are necessary to render his title perfect, and the defect can be supplied by the vendor, he may come into a court of equity and compel the vendor to execute them.¹

368. In regard to personalty it may be stated, as a general rule, that equity will not decree specific performance of contracts relating to this species of property, for the reason that compensation by way of damages is ordinarily sufficient ; although it has been held that the mere circumstance that the bill seeks performance of a contract which relates to personalty, does not render it demurrable.² It is obvious, however, that sometimes the detention of chattels cannot be adequately redressed by damages, and in such cases the jurisdiction of equity attaches. Accordingly, contracts for the sale of shares in a particular company³ (though not ordinarily for the sale of stock) ;⁴ for the sale of a life annuity ;⁵ or for the delivery of chattels which can be supplied by the vendor alone, as ship timber of a particular kind essential to complete a ship ; may all be specifically enforced.⁶ The relief

¹ See *Pye v. Daubuz*, 3 Bro. C. C. 595 ; *Edwards v. Appelbee*, 2 *Id.* 652, n. ; *Smith v. Baker*, 1 Y. & C. Ch. 223 ; *Gibson v. Goldsmid*, 5 De G. M. & G. 757 (a case of shares in a gas company) ; *Nelson v. Harwood*, 3 Call, 342 ; *Davis v. Tolle-mache*, 2 Jur. (N. S.) 1181 ; *Fields v. Squires*, 1 Deady, 366 ; *Rawle on Covenants for Title*, 656 *et seq.* ; 2 *Sugden V. and P.* 294 (8th Am. ed.).

² *Carpenter v. Mutual Safety Ins. Co.*, 4 Sand. Ch. 408.

³ *Duncuft v. Albrecht*, 12 Sim. 189 ; *Columbine v. Chichester*, 2 Ph. 27 ; *Poole v. Middleton*, 7 Jur. N. S. 1262 ; *Shaw v. Fisher*, 2 De G. & Sm. 11 ; *Wynne v. Price*, 3 De G. & Sm. 310 ; *Ferguson v.*

Paschall, 11 Missouri, 267 ; *Brown v. Gil-liland*, 8 Desaus. 539 ; *Todd v. Taft*, 7 Allen, 371 ; *Ashe v. Johnson*, 2 Jones Eq. 149. A bill for specific performance will be entertained when its object is to obtain the delivery of certificates of stock which confer the legal title to it ; *Doloret v. Rothschild*, 1 Sim. & Stu. 590 ; *Pooley v. Budd*, 14 Beav. 84.

⁴ *Ross v. Union Pacific R. R. Co.*, 1 Woolw. 26 ; *Fallon v. Railroad Co.*, 1 Dill. 121 ; *Cuddee v. Rutter*, 1 P. W. 570 ; 1 *Lead. Cas. Eq.* 746 (3d Am. ed.).

⁵ *Withy v. Cottle*, 1 Sim. & Stu. 174.

⁶ *Buxton v. Lister*, 3 Atk. 383 ; *Fry on Spec. Perf.*, § 33.

in cases of personalty has also been frequently applied where articles of peculiar value have been tortiously withheld. Such is the case of the famous Pusey Horn, which had from time immemorial gone along with the plaintiff's estate, and whereby the said estate was held;¹ of the altar piece, part of the estate of the Percys, and to which the Duke of Somerset had become entitled as treasure trove;² and, in more modern times, the instruments, maps, and plans of a surveyor which were withheld from him by a clerk in his employment.³ Bills were also not unfrequently entertained in the Southern States for the specific delivery of domestic slaves.⁴

It may also be mentioned in this connection that where the contract or duty concerning personal chattels amounts to a trust, the performance of such a duty will be specifically enforced, no matter what the nature of the particular property may be.⁵

369. Courts of equity may also enforce specific performance of contracts of personalty where the damages in money cannot be *ascertained*. An instance of this rule may be found in the case of *Adderly v. Dixon*, where the contract was for the sale of debts proved under two commissions of bankruptcy, and specific performance was granted on the ground that to compel the plaintiff to accept damages would be in effect to make him sell the dividends, which were of unascertained value, at a conjectural price.⁶

370. Other contracts besides those of sale may be decreed to be specifically performed. Thus performance has been decreed in the case of agreements to insure (and this, too, even after a loss);⁷ to receive certain goods in payment of a debt;⁸ to divide

¹ *Pusey v. Pusey*, 1 Vern. 273; 1 Lead. Cas. Eq. 768.

² *Duke of Somerset v. Cookson*, 3 P. Wms. 389; 1 Lead. Cas. Eq. 769.

³ *McGowin v. Remington*, 2 Jones (Pa.), 56. See, also, *Falcke v. Grey*, 4 Drew. 651.

⁴ *Sarter v. Gordon*, 2 Hill Ch. 121; *Young v. Burton*, 1 McMul. Eq. 255; *Fry on Spec. Perf.* 55 (2d Am. ed.), note;

note to *Cuddee v. Rutter*, 1 Lead. Cas. Eq. 762.

⁵ *Cowles v. Whitman*, 10 Conn. 121.

⁶ *Adderley v. Dixon*, 1 Sim. & Stu. 607. See, also, *Sullivan v. Tuck*, 1 Maryl. Ch. 59; *Waters v. Howard*, *Id.* 112; *Finley v. Aiken*, 1 Grant's Cas. (Pa.) 83.

⁷ *Tayloe v. Merchants' Ins. Co.*, 9 How. 390; *Carpenter v. Mutual Safety Ins. Co.*, 4 Sand. Ch. 408.

⁸ *Very v. Levy*, 13 How. 345.

chattels which formed the assets of a firm among the partners;¹ to plant peach trees furnished by the plaintiff under a promise that the defendant would set them out on his farm, send them to market, and render an account of the profits,² or to assign a patent.³ In short, any agreement will be enforced specifically in a court of equity where the specific thing or act contracted for, and not mere pecuniary compensation, is the redress practically required.⁴

371. While, as we have just seen, equity will grant specific performance in all cases where the dispensation of exact justice would seem to require it; on the other hand, it has been found necessary to circumscribe the exercise of this delicate and effective power by certain limitations. Specific performance is usually said to rest in the "discretion" of the chancellor.⁵ This discretion, however, is a judicial discretion. It is not like a mere arbitrary will, but is subject to certain definite and well-ascertained rules, within which its play is confined. What these rules are must now be noticed.

372. And in the first place, it is a fundamental principle that the extraordinary remedy of specific performance will not be administered save upon an application which is based upon a valuable consideration. The reason of this is obvious. The general ground for the relief is the inadequacy of damages. There can, of course, be no legal injury sustained, and, therefore, no question of adequacy or inadequacy of damages in cases where no valuable consideration exists, and no pecuniary loss has consequently been suffered. Equity, therefore, will not interfere to enforce the specific performance of a *gift*. If, indeed (it must always be remembered), the gift has assumed such a definite and complete shape, that it is entitled to be considered a trust, the

¹ Kirksey v. Fike, 27 Alab. 283.

² McKnight v. Robbins, 1 Halst. Ch. 229.

³ Binney v. Annan, 107 Mass. 94.

⁴ The insertion of a penalty for non-compliance with a contract as "liquidated damages," will not deprive a party of his right to specific performance. Hull v. Sturdivant, 46 Maine, 34; Hooker v. Pynchon, 8 Gray, 550; Moorer v. Kopmann, 11 Rich. Eq. 225; Daily v. Litch-

field, 10 Mich. 38. See Dowling v. Betjemann, 2 Johns. & H. 544; Gillis v. Hall, 2 Brewster (Pa.), 342; *ante*, p. 187, note 4.

⁵ Joynes v. Statham, 3 Atk. 388; Seymour v. Delancey, 6 Johns. Ch. 222; Willard v. Tayloe, 8 Wal. 557; St. John v. Benedict, 6 Johns. Ch. 111; Sherman v. Wright, 49 New York, 231; Quinn v. Roath, 37 Conn. 16; McComas v. Easley, 21 Grat. 23; Cox v. Middleton, 2 Drew. 209.

performance of this trust will be enforced. But this is on entirely different grounds; and the distinction between the two cases is clearly and thoroughly established. If A. makes a gift unaccompanied by delivery, it is simply an incomplete gift, and cannot be enforced against the will of the donor. But if A. constitutes himself trustee of a chattel for the benefit of B., B. certainly can enforce the trust, and this in opposition to A. In other words, equity will not make a man a trustee for the benefit of a mere volunteer; but if the man constitutes himself a trustee, equity will enforce the trust.

373. It is essential to specific performance that the consideration should be *valuable*; a mere good consideration, such as natural love and affection, or the performance of a moral duty, will not be sufficient.¹

Moreover, it is necessary that the consideration shall be actual. A constructive consideration, such as that imported by the seal to a bond, will not do.²

374. In some cases the *adequacy* of the consideration has been inquired into. It has been seen in a former chapter that mere inadequacy of consideration is not sufficient, as a general rule, to set a transaction aside;³ and the same rule is also true in cases where specific performance is asked for; and relief will not usually be refused on that ground alone.⁴ But cases may occur in which the court will exercise its discretion, and will refuse to lend the aid of the chancellor to the enforcement in specie of a hard and unreasonable bargain.⁵

¹ *Jefferys v. Jefferys*, Cr. & P. 138; *Moore v. Crofton*, 3 Jones & Lat. 442; *lative purchases, e. g. of mines. Haywood v. Cope*, 25 Beav. 140.

Kennedy v. Ware, 1 Barr, 445; *Morris v. Lewis*, 33 Ala. 53. See, however, *Taylor v. James*, 4 Desaus. 5; *McIntire v. Hughes*, 4 Bibb, 186; *Caldwell v. Williams*, 1 Bailey Eq. 175; *Hayes v. Ker-show*, 1 Sandf. Ch. 261. See *ante*, p. 81.

² *Adams's Doct. Eq.* 78.

³ *Ante*, p. 216.

⁴ *Lee v. Kirby*, 104 Mass. 420; *Erwin v. Parham*, 12 Howard, 197; *Hale v. Wilkinson*, 21 Grat. 75; 1 Sug. V. and P. 421 (8th Am. ed.); *Borell v. Dann*, 2 Hare, 440. This is particularly true of specu-

⁵ *Osgood v. Franklin*, 2 Johns. Ch. 23; 14 Johns. 527; *Howard v. Edgell*, 17 Verm. 9; *Shepherd v. Bevin*, 9 Gill, 32; *Harrison v. Town*, 17 Missouri, 237; *Powers v. Hale*, 5 Foster, 145; *Falcke v. Gray*, 4 Drew. 651. Some curious cases upon the 'subject of adequacy of consideration have arisen in the Southern States, under contracts made during the war of 1861-5, for the purchase of real estate in confederate currency, and which have been sought to be enforced after the termination of the war, when

375. In the second place, a party seeking specific performance must not only be a claimant for value, but he must also show that damages would not afford an adequate compensation. Hence, if money will operate as a sufficient redress, a chancellor will not interfere.¹ This is the reason for the difference between the rule in regard to specific performance of contracts relating to realty, and those concerning personalty.² For the distinction is not founded upon the nature of the property, but upon the fact that in one case damages in money would not operate to give a party the full measure of redress which he ought to have; whereas in most cases of personalty, to give a man a money equivalent is as good as giving him the thing itself.³ For the same reason, in some exceptional cases, specific performance will, as we have seen, be decreed as to personalty; because in such cases the redress by damages would be inadequate.

376. In the third place, it must be remembered that the jurisdiction to enforce specific performance is always exercised subject to general equitable considerations, and will not be applied to cases where the complainant does not come in with clean hands, or where equities exist on the other side, which would render it unjust to grant the relief.⁴ Thus if the complainant has been guilty of negligence and *laches*, or has shown a backwardness in fulfilling the contract on his part;⁵ or where the contract is hard

the confederate money had become worthless. It was held that as the consideration was adequate at the time of the contract, the court would decree specific performance. *Hale v. Wilkinson*, 21 Grat. 75; *Ambrose v. Keller*, 22 *Id.* 769; *Talley v. Robinson*, *Id.* 888. These decisions were properly based upon the ruling of the Supreme Court of the United States in *Thorington v. Smith*, 8 Wal. 1, and *Delmas v. Insurance Co.*, 14 *Id.* 665, that the notes of the confederacy actually circulating as money at the time the contract was entered into constitute a valid consideration for such contract.

¹ *Johnson v. Railroad Co.*, 19 Eng. L.

and Eq. 584; *Richmond v. Railroad Co.*, 33 Iowa, 439.

² See *Hall v. Warren*, 9 Ves. 605; *Harnett v. Yeilding*, 2 Sch. & Lef. 553; *Finley v. Aiken*, 1 Grant's Cas. (Pa.) 83; notes to *Cuddee v. Rutter*, 1 Lead. Cas. Eq. 746 (3d Am. ed.).

³ See remarks of Sir J. Leach, V. C., in *Adderley v. Dixon*, 1 Sim. & Stu. 607.

⁴ See *McDavit v. Pierrepont*, 8 C. E. Green, 45, 46; *Pinner v. Sharp*, *Id.* 274.

⁵ *Rose v. Swann*, 56 Ill. 40; *Iglehart v. Gibson*, *Id.* 81; *Miller v. Henlan*, 1 P. F. Sm. 265; *Rogers v. Williams*, 28 Leg. Int. 341; *Hubbell v. Van Schoening*, 49 N. Y. 326; *Finch v. Parker*, 49 N. Y. 1; *Crane v. De Camp*, 6 C. E. Green, 420.

and destitute of all equity;¹ or is oppressive on the defendant;² or the condition of things has materially changed;³ or there is a substantial defect in the complainant's title not remediable before decree; or the title of the complainant is doubtful or one that would involve the defendant in litigation; or there has been any misrepresentation or mistake;⁴ or the contract is founded on imposition;⁵ or is made by an agent in a manner not authorized by the principal;⁶ or will involve a breach of trust;⁷ in all of the above cases specific performance will be refused.

377. The other circumstances, in addition to those already mentioned, which usually influence the discretion of a chancellor in decreeing or refusing specific performance, are that the agreement must be *mutual*, that its terms must be *certain*, and that its enforcement by the courts must be *practicable*. Equity will not decree the specific performance of a unilateral contract.⁸ Thus a *feme covert* cannot obtain specific performance of a contract which is not binding on her;⁹ and the rule is the same as to an infant.¹⁰ Again, the terms of the agreement must be certain. It was one of the rules laid down by Lord Rosslyn in *Walpole v. Orford*, that "all agreements in order to be executed in this court must be certain and defined;"¹¹ and the law as thus stated is well settled both in England and in this country,¹² having been recognized in many cases in nearly all the States of the Union.¹³ This rule is, however, subject to two qualifications:

¹ *King v. Hamilton*, 4 Pet. 311; *Western R. R. v. Babcock*, 6 Met. 346.

² *Wedgwood v. Adams*, 6 Beav. 600; *Webb v. London and Portsmouth R. R. Co.*, 1 De G. M. & G. 521; *Bowles v. Woodson*, 6 Grat. 78.

³ *Peters v. Delaplaine*, 49 N. Y. 362; *Booten v. Scheffer*, 21 Grat. 474.

⁴ *Malins v. Freeman*, 2 Keen, 25; *Colyer v. Clay*, 7 Beav. 188; *Bruck v. Tucker*, 42 Cal. 346.

⁵ *Brady's Appeal*, 16 P. F. Sm. 277; *Piersol v. Neill*, 13 *Id.* 420.

⁶ *Daniel v. Adams*, Ambler, 495.

⁷ *Mortlock v. Buller*, 10 Ves. 292; 2 Lead. Cas. Eq. 427; note to *Woollam v. Hearne*.

⁸ *Marble Company v. Ripley*, 10 Wal. 339; *Bronson v. Cahill*, 4 McLean, 19; *Tyson v. Watts*, 1 Maryl. Ch. 13; *Benedict v. Lynch*, 1 Johns. Ch. 370; *Bodine v. Glading*, 9 Harris (Pa.), 50; *Corson v. Mulvany*, 13 Wright, 88; *Jones v. Noble*, 3 Bush, 694; *Ewins v. Gordon*, 49 N. Hamp. 444; *Meason v. Kaine*, 13 P. F. Sm. 340.

⁹ *Richards v. Green*, 8 C. E. Green, 536; *Pinner v. Sharp*, *Id.* 274.

¹⁰ *Flight v. Bolland*, 4 Russ. 298.

¹¹ 3 Ves. 420.

¹² See Fry on Specific Performance, § 203 *et seq.*, and § 229 *et seq.*

¹³ *Dodd v. Seymour*, 2 Conn. 473; *Waring v. Ayers*, 40 N. Y. 357; *King v. Ruck-*

first, that specific performance will not be refused if the uncertainty is owing to the fault of the defendant;¹ and, secondly, that, in obedience to the maxim *id certum est quod certum reddi potest*, performance will be decreed if the means of ascertaining the contract are at hand.²

A court of chancery, moreover, will not decree the specific performance of a contract, where it would be impossible for the court to enforce the execution of its decree, or where the literal performance if enforced would be a vain and idle act. Thus a court will not attempt to enforce a contract to work the line of a railway company, and keep its engines and rolling stock in order, for it would be out of the power of the court to see that such a contract was carried out;³ and a contract to convey real estate of which the vendor has no title will not be decreed, for such a decree would be simply nugatory.⁴ The performance of the contract, in short, must not be impracticable.

378. It is a settled and invariable rule that a purchaser shall not be compelled, by a decree of a court of equity in a suit for specific performance, to accept a doubtful title. It has been said that the title which a purchaser is compellable to take ought, like Cæsar's wife, to be free even from suspicion;⁵ although in some cases the rule has not been enforced with quite that degree of strictness. Thus, in *Beioley v. Carter*,⁶ a purchaser was compelled to take a title which appeared good to the Court of Appeals, although the judge of the court below had been of a different opinion; and in *Dalzell v. Crawford*⁷ it was said that

man, 5 C. E. Green, 316; *Nichols v. Williams*, 7 *Id.* 65; *Parrish v. Koons*, 1 Pars. Eq. 97; *Hammer v. McEldowney*, 10 Wright (Pa.), 334; *Canton Co. v. The Railroad Co.*, 21 *Maryl.* 395; *Aday v. Echols*, 18 *Alab.* 353; *Madeira v. Hopkins*, 12 *B. Monr.* 595; *Munsell v. Loree*, 21 *Mich.* 491; *Jordan v. Deaton*, 23 *Ark.* 704.

¹ *Pritchard v. Ovey*, 1 *J. & W.* 396; *Lord Kensington v. Phillips*, 3 *Dow.* 61.

² See *Walker v. The Eastern Counties Railway*, 6 *Hare*, 594; *Laird v. The Birkhead Railway Co.*, *Johns.* 501; *Dike v. Green*, 4 *R. Island*, 405; *Van Doren v. Robinson*, 1 *Green Ch.* 256; *Prater v.*

Miller, 3 *Hawks*, 628; *Fry on Specific Performance*, § 207.

³ *Johnson v. Shrewsbury and Birmingham Railway Co.*, 3 *De G. M. & G.* 914. See, also, *Blackett v. Bates*, *L. R.* 1 *Ch. App.* 117; *Port Clinton R. R. Co. v. The Cleveland and Toledo R. R. Co.*, 13 *Ohio N. S.* 544; *Ross v. The Union Pacific R. Co.*, 1 *Woolw.* 26; *Fallon v. Railroad Co.*, 1 *Dill.* 121.

⁴ *Fitzpatrick v. Featherstone*, 3 *Alab.* 40.

⁵ 1 *Sug. V. and P.* 577 (8th *Am. ed.*).

⁶ *L. R.* 4 *Ch. App.* 230. See *Collier v. McBean*, *L. R.* 1 *Ch. App.* 81.

⁷ 1 *Pars. Eq. (Pa.)* 37.

adverse opinions of conveyancers and counsel did not constitute a sufficient ground for refusing a decree. But the general current of authority is undoubtedly against forcing upon a purchaser any title as to which there may be the slightest doubt or suspicion;¹ although it is difficult to extract from the decisions any rule which can always be applied. "To force a title on a purchaser" said the Vice-Chancellor in *Rogers v. Waterhouse*, "the opinion of the court in favor thereof must be so clear that it cannot be apprehended that another judge may form a different opinion."²

379. *Pyrke v. Waddingham*³ may probably be considered the leading case upon this subject in England. The proposition was there laid down that a doubtful title which a purchaser will not be compelled to accept, is not only a title upon which the court entertains doubt, but includes also a title which, although the court has a favorable opinion of it, yet may reasonably and fairly be questioned, in the opinion of other competent persons; for the court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion in favor of the title should turn out not to be well founded. If the doubts as to a title arise upon a question connected with the general law, the court is to judge whether the general law upon the point is or is not settled; and if it be not, or if the doubts as to the title may be affected by extrinsic circumstances, which neither the purchaser nor the court can satisfactorily investigate, specific performance will be refused. These propositions have been adopted as correct statements of the law upon this subject in the case of *Mullings v. Trinder*, decided in 1870.⁴

¹ *Pyrke v. Waddingham*, 10 Hare, 1; *Mullings v. Trinder*, L. R. 10 Eq. 449; *Rogers v. Waterhouse*, 4 Drew. 329; *Hepburn v. Dunlop*, 1 Wheat. 179; *Richmond v. Gray*, 3 Allen, 25; *Sturtevant v. Jaques*, 14 Allen, 523; *Chambers v. Tullane*, 1 Stockt. 146; *Young v. Rathbone*, 1 C. E. Green, 224; *Swayne v. Lyon*, 17 P. F. Sm. 436; *Swain v. The Fidelity Ins. Co.*, 4 *Id.* 455; *Freetly v. Barnhart*, 1 *Id.* 279; *Speakman v. Forepaugh*, 8 Wright (Pa.), 363; *Griffin v. Cunningham*, 19 Grat. 571; *Voorhees v. De Myer*,

3 Sandf. Ch. 614; *Sebring v. Mersereau*, 9 Cowen, 344; *Butler v. O'Hear*, 1 De-saus. 382; *Thompson v. Dulles*, 5 Rich. Eq. 370; *Laurens v. Lucas*, 6 Rich. Eq. 217; *Lewis v. Herndon*, 3 Litt. 358; *Kelly v. Bradford*, 3 Bibb, 317; *Fitzpatrick v. Featherstone*, 3 Alab. 40.

² *Rogers v. Waterhouse*, 4 Drew. 329.

³ 10 Hare, 1.

⁴ L. R. 10 Eq. 449. Singular to say, in this case, Lord Romilly, M. R., while approving of the rules laid down by (then) Vice-Chancellor Turner in *Pyrke v. Wad-*

380. A mere *possibility* of an adverse claim is not sufficient to render a title doubtful,¹ nor a mere pecuniary charge, if the purchaser can be protected against it.²

It may be added here that it has been decided that a court of equity will decree specific performance if the vendor is able to make a good title at any time before final decree.³ But this doctrine will not be carried to the extent of holding that a vendor is entitled to specific performance if he had *no* title at the date of the contract, although he may have subsequently acquired one, for one who speculates upon that which is not within his control is not a *bonâ fide* contractor, and there is no mutuality between the parties.⁴

When a vendor has a defective title the vendee may, if he chooses to rely upon the covenants for title, compel the specific performance of the contract.⁵

But where the vendor has *no* title, the vendee cannot compel a conveyance, for that would be to decree the performance of an unlawful act.⁶

381. It was (and is) a well established rule in England that specific performance of a written contract with a parol variation will not be enforced. What is meant by this rule is this: The ordinary principle of evidence in regard to contracts which have been reduced to writing, is that the intention of the parties is to be gathered solely from the written agreement, and that no evidence can be admitted to show any verbal qualification of the writing. Cases of fraud or mistake formed, as we have

dingham, refused to follow that decision under exactly similar circumstances. A collection of examples of titles which have been held good and those which have been held bad or doubtful will be found in Watson's Compendium of Equity, 1040, 1041.

¹ Hillary v. Waller, 12 Ves. 252. See, also, Vreeland v. Blauvelt, 8 C. E. Green, 483.

² Tiernan v. Roland, 3 Harris (Pa.), 441.

³ Hepburn v. Dunlop, 1 Wheat. 179; Baldwin v. Salter, 8 Paige, 473; Graham v. Hackwith, 1 Marsh. 423; Tyree v.

Williams, 3 Bibb, 365; Seymour v. Delancy, 3 Cowen, 445; Moss v. Hanson, 5 Harris (Pa.), 379; Tiernan v. Roland, 3 Id. 429; Richmond v. Gray, 3 Allen, 25; Lockett v. Williamson, 37 Missouri, 388; Murrell v. Goodyear, 1 De G. F. & J. 432.

⁴ Forrer v. Nash, 35 Beav. 167; Wilson v. Williams, 3 Jur. N. S. 810; Tiernan v. Roland, 3 Harris (Pa.), 429; Moss v. Hanson, 5 Id. 379; Fry on Spec. Perf. § 875. But see Mortlock v. Buller, 10 Ves. 315.

⁵ Harding v. Parshall, 56 Ill. 227.

⁶ Chartier v. Marshall, 51 N. Hamp. 400. See Adams Eq. 80, 81.

seen, exceptions to this rule.¹ It has also been observed, in the preceding pages, that equity would not lend its aid to the enforcement of a contract into which a party had been induced to enter by misrepresentation or mistake. Hence, if from these causes a material stipulation had been omitted from an agreement, or the agreement did not express the real intention of the parties, parol evidence to establish that such was the case was admissible on behalf of the defendant, and constituted a good defence to the complainant's bill. But then the question occurred—ought equity to go one step further? Suppose a written contract had been drawn and executed, which by reason of some mistake or deceit did not properly express the intention of the parties; could the complainant show, by parol evidence, what the contract actually was, and then have a decree for the specific performance of the written agreement as modified by the parol evidence? In England this question was answered in the negative. The distinction is there well established between a party seeking, and one resisting specific performance—parol evidence to vary a written instrument being admissible in the latter case and not in the former.²

The difference between a plaintiff seeking and a defendant resisting specific performance is well illustrated by the case of *Townshend v. Stangroom*,³ in which both parties to a contract to lease filed bills, one to have the contract enforced as it was written, the other to have it carried out as modified by parol. Lord Eldon dismissed both bills; the first, because parol evidence was admissible on behalf of the defendant, the second because evidence of the same kind was not admissible on behalf of the complainant; and this distinction has been always recognized.⁴

382. In this country, however, although there has been some conflict of authority, the better opinion, perhaps, is that the English rule ought not to be strictly followed, but that in proper cases of fraud or mistake, a party ought to have the assistance

¹ *Ante*, p. 253.

² This distinction is independent of the statute of frauds.

³ 3 Vesey, 328. See, also, *Woollam v. Hearn*, 2 Lead. Cas. Eq. 484, and notes.

⁴ *Darnley v. Lond. Chat. & Dov. R. R. Co.*, L. R. 2 H. L. Cas. 43; *Fry on Spec. Perf.*, § 515 *et seq.*

of a chancellor in enforcing a written contract with a parol variation. This was laid down by Chancellor Kent, in the case of *Gillespie v. Moon*,¹ and has been recognized in several States.² In others the case has not been followed and the English rule is adhered to.³

It must next be noticed that an important point which is often to be taken into consideration, in determining whether a contract shall or shall not be enforced, is the effect of the statute of frauds. In cases which fall within that statute, it is obvious that to carry the rule in *Gillespie v. Moon* to the extent of holding that an agreement (for example), to convey fifty acres may, for the sake of justice and equity, be construed to mean a contract to convey one hundred, would be to repeal the statute of frauds, and to give effect to a simple verbal agreement to sell land. Where, however, the contention of the complainant is that something which is actually embraced in the writing was not intended to be included therein, to suffer him to show this is not to enforce a parol contract in relation to land, it is simply to prove that a written contract did not embrace all that on its face it appeared to include.⁴ Such was the actual state of the case in *Gillespie v. Moon*.⁵

383. It is well known that by the statute of frauds (the provisions of which have been adopted by legislative enactments in most of the United States), all uncertain interests in land created by parol merely had the force and effect, both at law and in equity, of estates at will only, saving always leases not exceeding three years from the making thereof. While, however, the

¹ 2 Johns. Ch. 585.

² See *Keisselbrack v. Livingston*, 4 Johns. Ch. 144; *Wall v. Arrington*, 13 Geo. 88; *Mosby v. Wall*, 23 Miss. 81; *Philpott v. Elliott*, 4 Maryl. Ch. 273; *Moale v. Buchanan*, 11 Gill & J. 314; *Tilton v. Tilton*, 9 N. Hamp. 385; *Bellows v. Stone*, 14 *Id.* 175; *Bradford v. Union Bank*, 13 Howard, 57.

³ *Elder v. Elder*, 1 Fairfield, 80; *Glass v. Hulbert*, 102 Mass. 24; *Osborn v. Phelps*, 19 Conn. 63; *Westbrook v. Harbeson*, 2 McCord Ch. 112; *Brooks*

v. Wheelock, 11 Pick. 439; *Miller v. Chetwood*, 1 Green Ch. 199; *Dennis v. Dennis*, 4 Rich. Eq. 307; *Best v. Stow*, 2 Sandf. Ch. 298; *Climmer v. Hovey*, 15 Mich. 18; and see American note to *Woollam v. Hearn*, 2 Lead. Cas. Eq. 684, 685 (3d Am. ed.); 1 Sug. V. and P. 243 (8 Am. ed.), and notes.

⁴ See American note to *Woollam v. Hearn*, *ut sup.*

⁵ See *Glass v. Hulbert*, 102 Mass. 24, where the authorities are examined and the case of *Gillespie v. Moon* explained.

provisions of this statute were rigorously enforced at law, it was considered in equity that a case might be taken out of the statute by peculiar circumstances which might render its application inequitable and unjust. The statute being designed to prevent frauds, equity would not allow it to be used or set up for the purpose of effecting a fraud. Hence there arose certain well-established exceptions to the statute, in which equity would lend its aid to protect a party in the enjoyment of real estate, or actively to assert his rights thereto under a parol contract. These cases may be reduced to three classes: first, where there has been a part performance of the contract; secondly, where the reduction of the contract to writing has been prevented by fraud; and thirdly, where the contract is admitted by the defendant's answer, and the statute is not set up as a defence.¹

384. The doctrine of part performance is based upon the principle that where a contract is so far performed that the parties could not be restored to their original position if the contract was rescinded, it would be highly unjust to allow any technical objection to the fulfilment of the contract to be interposed. Hence, if a verbal contract is made for the sale of real estate, and is acted upon to the extent above indicated, neither party can then refuse to perform it on the ground that the provisions of the statute of frauds have not been complied with. If, for example, upon the faith of a parol agreement, the purchaser has gone into possession, has paid the purchase-money, and has made valuable improvements, the vendor will not be suffered to set up the statute of frauds as a ground for refusing to execute a conveyance. The case, as it is said, is taken out of the statute.²

385. The general doctrine of part performance is well established; and is recognized in most of the States of the Union.³

¹ See Smith's Manual of Equity, 252.

² Adams's Eq. 86.

³ In *Wright v. Pucket*, 22 Grat. 374, it is said that from the numerous decisions upon the subject the following principles may be extracted:—

1st. The parol agreement relied on must be certain and definite, and definite in its terms:

2d. The acts proved in part perform-

ance must refer to, result from, or be made in pursuance of the agreement proved: and

3d. The agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which does not lie in compensation.

These propositions seem to be fairly deducible from the authorities. See,

The difficulty in most cases has been to say what will take a case out of the statute; in other words, what must be the predicament of the parties which would justify a court in saying that it would be inequitable to suffer the bar of the statute to be set up.¹

It is settled that going into possession under the contract, and making improvements will be sufficient.² And in some cases entry into possession alone has been held to be enough.³ But possession must be taken under and by virtue of the contract, otherwise it cannot avail, and indeed as a general rule anything that is relied upon to take the case out of the statute must be done in pursuance of the contract, and must not be referable to another title.⁴ If the vendee is already in possession of the property, the continuance of this possession will not be considered a part performance to take the case out of the statute.⁵

upon this subject, *Purcell v. Miner*, 4 Wall. 513; *Newton v. Swazey*, 8 N. Hamp. 9; *Annan v. Merritt*, 18 Conn. 478; *Parkhurst v. Van Cortland*, 14 Johns. 15; *Dougan v. Blocher*, 12 Harris (Pa.), 28; *McCue v. Johnston*, 1 Casey, 306; *Gough v. Crane*, 3 Maryl. Ch. 119; *Wilde v. Fox*, 1 Rand. 165; *Printup v. Mitchell*, 17 Georgia, 558; *Parke v. Lee-wright*, 20 Missouri, 85; *Ottenhouse v. Burleson*, 11 Tex. 87; *Arguello v. Edinger*, 10 Cal. 150; *Galbraith v. Galbraith*, 5 Kans. 402. In other States, however, the rule is different; see *Stearns v. Hubbard*, 8 Greenleaf, 320; *Patterson v. Yeaton*, 47 Maine, 308; *Parker v. Parker*, 1 Gray, 409; *Patton v. McClure*, 1 Mart. & Yerg. 333; *Ridley v. McNairy*, 2 Humph. 174; *Robeson v. Hornbaker*, 2 Green Ch. 60; *Wingate v. Dail*, 2 Har. & J. 76; *Ellis v. Ellis*, 1 Dev. Eq. 341; *Albea v. Griffin*, 2 Dev. & Bat. Eq. 9; *Allen v. Chambers*, 4 Ired. Eq. 125; 1 Sug. V. and P. 225, note (8th Am. ed.).

¹ See *Milliken v. Dravo*, 17 P. F. Sm. 230.

² *Freeman v. Freeman*, 48 N. Y. 34; *Casler v. Thompson*, 3 Green Ch. 59; *Smith v. Smith*, 1 Rich. Eq. 180; *Perkins v. Hadsell*, 50 Ill. 216. The improve-

ments must be of a permanent character; *Peckham v. Barker*, 8 R. Island, 17; *Wack v. Sorber*, 2 Whart. 387.

³ *Richards v. Green*, 8 C. E. Green, 32; S. C. on appeal, *Id.* 539; *Smith v. Underdunk*, 1 Sandf. Ch. 579; *Pugh v. Good*, 3 Watts & Serg. 56; *Moale v. Buchanan*, 11 Gill & J. 314; *Hart v. Hart*, 3 Desaus. 592; *Anderson v. Chick*, 1 Bailey Ch. 118; *Brock v. Cook*, 3 Porter, 464; *Waggoner v. Speck*, 3 Ham. 292; *Palmer v. Richardson*, 3 Strobb. Eq. 16. But see *Moore v. Small*, 7 Harris (Pa.), 461.

⁴ *Wright v. Puckett*, 22 Grat. 374; *Robertson v. Robertson*, 9 Watts, 32, 42; *Phillips v. Thompson*, 1 Johns. Ch. 181, 149; *Smith v. Smith*, 1 Rich. Eq. 180; *Sanborn v. Sanborn*, 7 Gray, 142, 146; *Ham. v. Goodrich*, 33 N. Hamp. 38; *Lester v. Kinne*, 37 Conn. 9, 14; 1 Sug. V. and P. 226, note (8th Am. ed.).

⁵ *Hatcher v. Hatcher*, 1 McMullan Ch. 311; *Johnston v. Glancy*, 4 Blackf. 94; *Christy v. Barnhart*, 2 Harris (Pa.), 260; *Mahana v. Blunt*, 20 Iowa, 142. See, however, *Blanchard v. McDougal*, 6 Wis. 167; *Spalding v. Conzelman*, 30 Missouri, 177.

But mere payment of the purchase-money is not enough;¹ unless, indeed, owing to peculiar circumstances the purchaser cannot be restored to his original position by repayment.²

When a parol contract is entered into in consideration of marriage, the solemnization of the marriage is not such a part performance as will take the case out of the statute.³

A party seeking specific performance cannot rely upon a part performance by the defendant to take the case out of the statute.⁴

The doctrine of part performance will operate to prevent a vendee who has gone into possession from insisting upon objections to the vendor's title. A waiver of objections may thus be presumed from conduct.⁵ The relief, however, if obtained at all, must be sought for in equity. It will not be given in a court of law.⁶ In some of the States, however, there are decisions tending to show that there may be a parol waiver of one or more of the terms of a contract which the statute requires to be in writing.⁷

336. The second class of cases in which the statute of frauds cannot be insisted upon for the purpose of defeating a parol contract as to realty, embraces those in which the reduction of the contract to writing has been prevented by fraud.

Thus if an intended husband, having promised to reduce a marriage settlement to writing, fraudulently prevents it from being done, and the marriage takes place in consequence of false

¹ *Clinan v. Cooke*, 1 Sch. & L. 40; *Hughes v. Morris*, 2 De G. M. & G. 356; *Purcell v. Miner*, 4 Wall. 513; *Kidder v. Barr*, 35 N. Hamp. 285; *Glass v. Hulbert*, 102 Mass. 21; *Eaton v. Whitaker*, 18 Conn. 222; *McKee v. Phillips*, 9 Watts, 85; *Parker v. Wells*, 6 Whart. 153; *Allen's Est.* 1 Watts & Serg. 383; *Cole v. Potts*, 2 Stockt. 67; *Underhill v. Allen*, 18 Ark. 466; *Townsend v. Houston*, 1 Har. (Del.) 532; *Lefferson v. Dallas*, 20 Ohio St. 74; *Mather v. Scoles*, 35 Ind. 5; 1 Sug. V. and P. 229 (8th Am. ed.). But in Iowa, payment of the purchase-money is sufficient to take the case out of the statute. *Fairbrother v. Shaw*, 4 Iowa, 570; *Olive v. Dougherty*, 3 G. Greene (Iowa), 371; *Johnson v. Glaucy*, 4 Blackf. 94.

² *Malins v. Brown*, 4 Comst. 403; *Everts v. Agnes*, 4 Wis. 343; *Johnston v. Hubbell*, 2 Stockt. 332.

³ *Caton v. Caton*, L. R. 1 Ch. Ap. 137; 2 H. L. 127.

⁴ *Id.* See, also, *Lockett v. Williamson*, 37 Missouri, 388.

⁵ *Palmer v. Richardson*, 3 Strobb. Eq. 16.

⁶ *Goss v. Lord Nugent*, 5 B. & Ad. 58.

⁷ *Stearns v. Hall*, 9 Cush. 31; *Cummings v. Arnold*, 3 Met. 486; *Buel v. Miller*, 4 N. Hamp. 196; 1 Sug. V. and P. 252 (8th Am. ed.).

assurances and contrivances, the circumstance that the agreement rests in parol cannot be taken advantage of in resisting an application for specific performance.¹

This class of cases, however, falls under the head of actual fraud, and is governed by the rules which apply to that branch of equitable jurisdiction. They are noticed in this connection simply in order to illustrate the rule in equity which forbids the statute of frauds to be used as an instrument to defeat the right to specific performance.

387. In the third place, a case will be taken out of the statute when the parol contract is admitted by the defendant in his answer, and the statute is not therein insisted upon as a defence. In such a case there can be no possibility of fraud or mistake; because nothing could be stronger evidence of the truth and accuracy of the plaintiff's version of the agreement, than the written admission by the defendant under oath. And the statute having been made for the protection of the defendant, it is perfectly competent for him to waive its benefit.²

If, however, the defendant insists upon the statute as a bar, the written admission in his answer will not avail to take the case out of the statute.

388. It has been stated above that one of the reasons why the remedy of specific performance was introduced in equity, was because at law the plaintiff is obliged to show on his part precise compliance with all the terms of the agreement, whereas chancery would sometimes afford him relief although he was unable to prove this exact fulfilment. It will be proper now to consider the two methods in which courts of equity grant this indulgence—viz., decreeing performance with compensation for defects, and giving time to make a title beyond the stipulated day.

389. And first as to performance with compensation for defects. It is settled that immaterial deficiencies will not deprive the vendor of his right to have the contract performed as against the vendee—provided that the deficiencies are such as may be compensated in money. Under such circumstances the vendee

¹ See *Montacute v. Maxwell*, 1 P. Wms. 618; *Story's Eq. Jurisp.*, § 768. ² See *Smith's Manual of Equity*, 252.

may be compelled to take the property, and a suitable deduction will be made in the price.¹

But if the deficiencies are material and important, the vendee will not be compelled to take the property.² He is entitled to have what he bargained for; and it would, obviously, be extremely unjust to force anything upon him which he had not designed or contracted to buy. If there is a failure in that which is an inducement to the purchase, he will not be compelled to take.³

390. It may sometimes happen that defects exist which render the property less valuable than the contract price; but which, nevertheless, may not be of so vital a character as to induce the purchaser entirely to throw up his bargain. In such a case the equity of specific performance with compensation comes into play for the benefit of the vendee. He is entitled to have the agreement carried out, and yet at the same time to have an abatement or allowance made by reason of the defects.⁴ Such a relief cannot, it is manifest, be obtained at law; and, therefore, is an additional illustration of the advantages of this kind of equitable remedy.⁵

There must, however, be some limits to this right of the vendee to elect to have the contract performed with compensation for defects; because in some instances its exercise would

¹ *Hepburn v. Auld*, 5 Cranch, 262; *nett*, 8 Paige, 312; 1 Sug. V. and P. King *v. Bardeau*, 6 Johns. Ch. 38; *Har-* 479 (8th Am. ed.).

bers v. Gadsden, 6 Rich. Eq. 284; *Seton v. Slade*, 2 Lead. Cas. Eq. p. 11, 33. The compensation may take another shape than a sum of money. Thus, in decreeing the specific performance of agreements for the partition of coal mines, an allowance of so much coal may be made; *Young v. Frost*, 1 Maryl. 377; *King v. Ruckman*, 5 C. E. Green, 316; *Coleman's Appeal*, 12 P. F. Sm. 252.

² *Whittemore v. Whittemore*, L. R. 8 Eq 603.

³ *Peers v. Lambert*, 7 Beav. 546; *Rugge v. Ellis*, 1 Desaus. 160; *Wainwright v. Read*, *Id.* 573; *Cordingley v. Cheesebrough*, 3 Giff. 496; *Stoddart v. Smith*, 5 Binney, 355; *Marvin v. Ben-*

⁴ *Thomas v. Dering*, 1 Keen, 729; *Wheatley v. Slade*, 4 Sim. 126; *Graham v. Oliver*, 3 Beav. 124; *Nelthorpe v. Holgate*, 1 Coll. 203; *Stockton v. Union Oil Co.*, 4 West Va. 273.

⁵ See *Johnson v. Johnson*, 3 Bos. & Pul. 162. See, also, *Denton v. Stewart*, 1 Cox, Ch. 258; *Andrews v. Brown*, 3 Cush. 130; *Harrison v. Deramus*, 33 Alab. 463; *Bell v. Thompson*, 34 *Id.* 633; *Lee v. Howe*, 27 Missouri, 521; *Smith v. Fly*, 24 Tex. 345; *Phillips v. Thompson*, 1 Johns. Ch. 149; *Parkhurst v. Van Cortlandt*, *Id.* 273; *Scott v. Bilgerry*, 40 Miss. 119; *Morss v. Elmen-dorf*, 11 Paige, 277.

work great injustice to the vendor. Thus a seller could not, for example, at the election of the purchaser, be deprived of his mansion house and park to which he could make a good title, while a large adjoining estate, held and sold with it, would be left on his hands with a proclaimed bad title.¹

Nor can a vendor be required to convey a different parcel of land from that agreed to be conveyed.²

The right both of the vendor and vendee cannot be exercised unless the defect is one which is capable of being measured by a pecuniary standard; in other words, capable of compensation. The compensation must not be a mere matter of arbitrary damages, or of indemnity for future risk.³

391. The second of the methods in which a court of equity grants indulgence to a party who has been unable to fulfil exactly his part of an agreement, and yet seeks the aid of the court to have it specifically enforced, is by giving time to make out a title beyond the day which the contract specifies. This is done in pursuance of the maxim that time is not ordinarily of the essence of the contract in equity,⁴ although it may sometimes become so. What is meant by this maxim and by its qualification, is this: A court of equity will relieve against and enforce specific performance notwithstanding a failure to keep the dates assigned by the contract, either for the completion, or for the steps towards completion, if it can do justice between the parties, and if there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant when it is said that in equity time is not of the essence of the contract.⁵

¹ Sug. V. and P. 316 (vol. i. 480, 8th Am. ed.).

² *Id.* See *Castle v. Wilkinson*, L. R. 5 Ch. App. 534.

³ Adams's Eq. 91.

⁴ Time is in general of the essence of the contract at law. *Wilde v. Fort*, 4 Taun. 334; *Steer v. Crowley*, 14 C. B. N. S. 337.

⁵ *Tilley v. Thomas*, L. R. 3 Ch. App. 67. In *Hepburn v. Auld*, 5 Cranch, 262,

Brashier v. Gratz, 6 Wheat. 528, and *Bank of Columbia v. Hagner*, 1 Pet. 455, it was held that in equity, time was not of the essence of a contract. See, also, *Remington v. Irwin*, 2 Harris (Pa.), 143; *Tiernan v. Roland*, 3 *Id.* 429; *Bryson v. Peak*, 8 Ired. Eq. 310; and *Glover v. Fisher*, 11 Ill. 666. But in *Goldsmith v. Guild*, 10 Allen, 239, the court did not approve of the doctrine. See 1 Sug. V. and P. 411 (8th Am. ed.).

392. An example of the rule now under consideration is where a vendor has undertaken to make a title on a certain day, and has failed to do so by reason of some defect in the title, which defect, however, is susceptible of being cured. It will be observed that the rule, as thus stated, does not apply to those cases in which the delay on the part of the vendor is due, not to any defects in his title which he desires time to remedy, but to his own carelessness and *laches*. Due diligence is required on both sides.¹ A vendor cannot have specific performance if he has been urged by the purchaser to take steps, but has not done so.² But where the delay is not due to the *laches* of the seller, but to defects in the title which may be cured, a bill for specific performance may be maintained, for it is sufficient if a party entering into articles to sell has a good title at the time of the decree.³ The court rectifies the incidental delay by giving the intermediate rents to the purchaser, and interest on the purchase-money to the vendor.

Such, then, is the general rule. It is subject to the qualification that time may be made the essence of a contract by express stipulation of the parties, or by presumption growing out of the nature of the property, or by surrounding circumstances.

393. As to "express stipulations" nothing need be said. It is perfectly clear that parties may stipulate that time shall be essential, and that when such a stipulation exists, it ought to be enforced.⁴

¹ *Merritt v. Brown*, 6 C. E. Green, 401; *Johns v. Norris*, 7 *Id.*, 102; *Taylor v. Longworth*, 14 *Peters*, 172; *Dubois v. Baum*, 10 *Wright (Pa.)*, 587; *Cureton v. Gilmore*, 3 S. Carolina (N. S.), 46; *Eastman v. Plumer*, 46 N. Hamp. 464, 479; *Rogers v. Saunders*, 16 Maine, 92; *Benedict v. Lynch*, 1 Johns. Ch. 375; *Leaird v. Smith*, 44 N. Y. 618; 1 Sug. V. and P. 261.

² It is not necessary that a demand for a deed should precede a bill for the specific performance of a contract to convey. This results from the distinction between a suit in equity for specific performance, and an action at law for non-performance, namely, that in the latter the right of

action grows out of a breach of the contract, and a breach must exist before the commencement of the action, while in the former the contract itself, and not the breach of it, gives the action. *Bruce v. Tilson*, 25 N. Y. 194; *Welland v. Huber*, 8 Nevada, 207.

³ See *Dresel v. Jordan*, 104 Mass. 415; *Barnard v. Lee*, 97 *Id.* 92.

⁴ See *Barnard v. Lee*, 97 Mass. 94; *Patchin v. Lamborn*, 7 Casey, 314; *Ives v. Armstrong*, 5 R. Island, 567; *Stow v. Russell*, 36 Ill. 18; *Heckard v. Sayre*, 34 *Id.* 142; *King v. Ruckman*, 5 C. E. Green, 316; 6 *Id.* 599; *Webb v. Hughes*, L. R. 10 Eq. 281.

It is also clear that the nature of the subject matter of the sale may render time of the essence of the contract. The case usually put is that of the sale of a reversion. Trades or manufactories furnish another illustration. The case of mines is still another example; for the whole purpose of the purchase may be the chance of an early development of the mine, and a speedy introduction of its product into the market.¹

394. As to the "surrounding circumstances" which may render time of the essence of the contract they must, of course, depend upon the facts of each particular case; such as whether the value of the property has greatly diminished, whether the vendee has bought to sell again, and so forth.² Indeed, in this country, the fact that land bears a much more commercial character than it does in England, is subject to more fluctuations, and has more of a speculative value, has led to not a few expressions of judicial opinion that time ought, as a general rule, to be considered as of the essence of a contract.³ But, perhaps, the safest statement of the law is to say that the general rule is the same in the United States as in England, but that exceptions growing out of the circumstances of the individual transaction are more numerous, and are looked upon with more favor.

395. It was stated above that the efficiency of the English courts of equity in granting specific relief, has been increased by the power conferred upon them of giving damages. This is done by virtue of the statute 21 & 22 Vic., c. 27, commonly known as Sir Hugh Cairns's Act, which provides that the courts may, either in addition to, or in substitution for the relief which is prayed, grant that relief which would otherwise be proper to be granted by another court, *i. e.*, award damages.

Before this act the law had been the other way. If a purchaser had recourse to equity, and it appeared that the vendor had since the filing of the bill sold the estate to another person,

¹ *Macbryde v. Weekes*, 22 Beav. 533; *Parker v. Frith*, 1 Sim. & Stu. 199, n.; *Day v. Luhke*, L. R. 5 Eq. 336; *Claydon v. Green*, L. R. 3 C. P. 511; *Cowles v. Gale*, L. R. 7 Ch. App. 12; *Newman v. Rogers*, 4 Bro. C. C. 391; *Adams's Equity*, 88; 1 Sugden V. and P. 403 (8th Am. ed.).

² *McKay v. Carrington*, 1 McLean, 50.

³ See dissenting opinion of Mr. Justice Livingston in *Hepburn v. Auld*, 5 Cranch, 279. See, also, *Richmond v. Gray*, 3 Allen, 30, 31; *Goldsmith v. Guild*, 10 *Id.* 239; 1 Sug. V. and P. 411 (8th Am. ed.), note.

the court could not give the complainant damages. But if pending a suit for specific performance the seller had disposed of part of the property—*e. g.*, stone in a quarry—the court would take care that the purchaser had full compensation in damages.¹ The general rule in the United States is the same, but courts have, in some instances, inclined to favor the right to give damages, and to retain the bill to that end.² But in England, by the act just cited, damages may be given, and the amount thereof assessed by a jury. Damages, however, will not be given in a case in which a bill for specific performance would not be entertained; for to do so would be simply to turn the equitable remedy into a common law action.³

396. In some of the United States, either in obedience to statutory enactments, or by virtue of a common law peculiar to the State, the remedy of specific performance may be enforced through the medium of a common law action.⁴ This is especially the case in Pennsylvania, where the action of ejectment has been, and still is, a favorite method of compelling either a vendor or a vendee to fulfil his agreement. In the former case, the purchaser recovers a verdict conditioned upon the payment of the purchase-money by the plaintiff; in the latter, the seller has a verdict, which is to be released upon the payment of the price by the buyer. Certain rules have been thrown around this species of action, growing out of the fact that it is one originally of common law origin; and, therefore, amenable to strict common law rules—*e. g.*, tender of a deed before bringing an action—which (it must be remembered) do not apply when relief is sought by a bill for specific performance.⁵

397. Before leaving the subject of specific performance it may be well to notice the fact that persons may, in some cases, be compelled to specifically perform promises or make good repre-

¹ 1 Sug. V. and P. 350 (8th Am. ed.). 20 P. F. Sm. 26; *Peabody v. Tarbell*,

² See *Phillips v. Thompson*, 1 Johns. 2 Cush. 226; *Andrews v. Brown*, 3 *Id.* Ch. 131; *Hatch v. Cobb*, 4 *Id.* 559; 131; *Fry on Spec. Perf.* 449 (2d Am. ed.); *Kemphshall v. Stone*, 5 *Id.* 193; *Jervis v. Smith*, 1 Hoff. Ch. 470; *Woodman v. Freeman*, 25 Maine, 531; *Nelson v. Hagerston Bank*, 27 *Maryl.* 76; *Nagle v. Newton*, 22 *Grattan*, 814; *May v. Le-Claire*, 11 *Wal.* 236; *Masson's Appeal*,

³ See *Welsh v. Bayaud*, 6 C. E. Green, 186; 1 Sug. V. and P. 353 (8th Am. ed.).

⁴ See *Weber v. Marshall*, 19 *Cal.* 447; *Fisher v. Moolick*, 13 *Wis.* 321.

⁵ See *ante*, p. 359, note 2.

sentations, upon the faith of which others have acted. This subject, however, has been already noticed under the head of Fraud.

398. It may, also, be observed that while a court of equity will not ordinarily attempt to enforce covenants, which cannot be carried out by the machinery of a court, *e. g.*, a covenant by a singer to sing, or an actor to perform; it may, nevertheless, practically attain the same end by enjoining the party from a breach of his negative covenant, viz., by preventing him from performing elsewhere. This exercise of the power of a chancellor, however, falls more properly under the head of Injunctions, where it will, therefore, be considered.

CHAPTER II.

INJUNCTIONS.

SECTION I.

GENERAL NATURE OF INJUNCTIONS; INJUNCTIONS TO RESTRAIN INFRINGEMENT OF EQUITABLE RIGHTS; AND HEREIN OF INJUNCTIONS TO RESTRAIN PROCEEDINGS AT LAW; OF BILLS OF PEACE; AND OF BILLS OF INTERPLEADER.

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| 399. Definition of an injunction. | litigation; election between remedies. |
| 400. Injunctions either mandatory or prohibitory; mandatory injunctions. | 414. Injunction after the court has assumed jurisdiction of a cause. |
| 401. Prohibitory injunctions. | 415. Bills of Peace, two classes; assertion of a common right. |
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| 404. <i>Ex parte</i> , or at the hearing. | 418. Bills of Peace of the second class. |
| 405. Common, or special. | 419. Bills of Interpleader. |
| 406. General division of the subject of injunctions. | 420. Bill must show title in two claimants. |
| 407. Injunctions to restrain proceedings at law; <i>Earl of Oxford's Case</i> . | 421. Complainant must claim no interest. |
| 408. Not in the nature of Writs of Prohibition. | 422. Debt or duty must be the same. |
| 409. General nature of this jurisdiction. | 423. Injunctions in aid of proceedings in Bankruptcy. |
| 410. General extent of this jurisdiction; equitable titles protected. | 424. In what courts proceedings will be restrained. |
| 411. Equitable rights protected. | 425. Injunctions in cases of trusts and mortgages. |
| 412. Equitable remedies assisted. | 426. Injunctions between partners. |
| 413. Injunctions to prevent vexatious | 427. Restraint of disclosure of confidential communications. |

399. An injunction in its ordinary sense is a command, and this command may be either to do, or to refrain from doing some particular thing.

An injunction in its legal sense is a writ remedial, issuing by order of a court of equity,¹ and commanding a defendant to perform some act, or restraining a defendant from the commission or continuance of some act.²

400. An injunction may, therefore, be said to be either mandatory or prohibitory. A mandatory injunction is one that compels the defendant to restore things to their former condition, and virtually directs him to perform an act.³ The jurisdiction of the court to issue such a writ has been questioned,⁴ but it is now established beyond doubt.⁵ The order, however, is not *direct* in its form; but the end is reached by a writ apparently prohibitory. Thus an injunction that a defendant should deliver up books and papers in his possession has been issued in this form: "Let an injunction be awarded to restrain the defendant H. from detaining and keeping possession of the books, deeds, documents, and papers removed, as mentioned in the plaintiff's affidavit, by the said defendant, or by his order, from the chambers occupied by the plaintiff, for retaining which no written authority has been produced by the defendant; and from permitting the same, or any, or either of them to remain away from the office of the plaintiff, or from parting with the same to any person or persons other than the plaintiff."⁶ This order, it will be observed, is in terms a restraining order; but in effect it is a command to the defendant to deliver up the books and papers. Many occasions may arise which render a mandatory injunction necessary. Thus a party who has diverted water from its proper channel may be compelled by mandatory injunc-

¹ And in some cases by courts of common law in the exercise of equitable jurisdiction.

² Joyce on Injunctions, 1.

³ *Id.* 1309, 1310.

⁴ *Blakemore v. Glamorganshire Railway Co.*, 1 M. & K. 184.

⁵ *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Great North of England Railway*

Co. v. Clarence Railway Co., 1 Coll. 507; *Hervey v. Smith*, 1 K. & J. 392; *Att. Gen. v. Borough of Birmingham*, 4 K. & J. 547; *Kerr on Injunctions*, 230.

⁶ *Joyce on Injunctions*, 1310. See *Wellington v. Railroad Co.*, 107 Mass. 582; and *Manhattan Manuf. Co. v. New Jersey Stock Yard Co.*, 8 C. E. Green, 166.

tion to restore it.¹ So a mandatory injunction issues to remove a nuisance;² to prevent the continuance of trespasses for which there is no adequate legal remedy;³ and to compel the defendant to deliver up the possession of real estate which had been adjudged to belong to the plaintiff by decree.⁴ In this last case the injunction is in the nature of a writ of execution. A mandatory injunction is granted only with great caution; and the courts are particularly reluctant to grant such an injunction upon an interlocutory application, and before final decree.⁵ Indeed, the inclination of the American courts is against granting such an interlocutory injunction.⁶ But in England the better opinion is, that a mandatory injunction *may* be had upon interlocutory application.⁷

401. A prohibitory injunction, as its name imports, is one which is granted for the purpose of restraining the defendant from the continuance or commission of some act which is injurious to the plaintiff. This is by far the more frequent form which the injunction assumes; and it is met with in the everyday exercise of equitable powers. The occasions which call it forth will be explained further on.

402. The relief afforded by the writ of injunction is probably the most effective, the most characteristic, and the most extensive of equitable remedies. It is most frequently employed (as has been already stated) in its prohibitory form, and it is used to prevent injuries to property which are imminent, irreparable, and for which damages furnish an entirely inadequate redress. With the single exception of the writ of estrepement, no com-

¹ *Corning v. Troy Iron Co.*, 40 N. Y. 191.

² *Gale v. Abbot*, 8 Jur. N. S. 987; *Hervey v. Smith*, 1 K. & J. 392.

³ *Manchester Railway Co. v. Workson*, 23 Beav. 198; *Eachus v. Moss*, 14 Week. Rep. 327; *Martyr v. Lawrence*, 2 De G. J. & S. 261; *High on Injunctions*, § 478. An injunction will not issue to compel the rebuilding of a wall; *Doran v. Carroll*, 11 Irish Ch. 379.

⁴ See *Garretson v. Cole*, 1 Har. & Johns. 370; *High on Injunctions*, § 260.

⁵ *Turner v. Spooner*, 1 Dr. & Sm. 467.

⁶ *Audenreid v. Philadelphia and Read-*

ing R. R. Co., 18 P. F. Sm. 370; *Washington University v. Green*, 1 Maryl. Ch. 97; *Camblos v. Philadelphia and Reading R. R. Co.*, 30 Leg. Int. 149 (U. S. Circ. Court, East. Dist. Penna.).

⁷ *Lane v. Newdigate*, 10 Ves. 192; *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Rankin v. Huskisson*, 4 Sim. 18; *Hervey v. Smith*, 1 K. & J. 392; *Att. Gen. v. Metropolitan Board of Works*, 1 Hem. & M. 312; *Hepburn v. Lordan*, 2 *Id.* 345; *Kerr on Injunctions*, 252. See, however, *Gale v. Abbott*, 8 Jur. N. S. 987; and *Child v. Douglass, Kay*, 578.

mon law process exists by which injuries to property can be *prevented* as distinguished from being *redressed*; and hence the equitable remedy by injunction possesses a peculiar value as furnishing a kind of relief which can be obtained in no other *forum*. No remedy either at law or in equity, can compare with the injunction in promptness and completeness; and hence no equitable remedy has been so frequently or extensively called into play, or has contributed so much to the extension of the jurisdiction of courts of chancery.

The remedy afforded by the civil law which approaches most nearly to that given by the injunction, was the *interdict* and action founded thereon. These interdicts were under prætorian authority, and were pronounced by the prætors by virtue of their extraordinary jurisdiction, and in mitigation of the severity which had resulted from an undeviating adherence to the technical forms of the civil law.¹

Injunctions are of very early occurrence in the history of the English law. Mr. Spence gives an instance of an injunction issued in the reign of Henry I.;² and several cases of injunctions are to be found in the Chancery Calendar.³

403. Besides the classification into mandatory and prohibitory there are several other divisions of injunctions.

Injunctions are either interlocutory or perpetual.⁴ An interlocutory injunction is one granted upon preliminary application, (generally when the bill is filed), and before final hearing. It is provisional merely, and concludes no rights. A perpetual injunction, on the other hand, is made only on final decree, and is an adjudication upon the merits of the controversy. It constitutes, in fact, the decree, or part of the decree, in the cause.

404. Injunctions are either *ex parte*, that is, granted upon the application of the plaintiff, without the defendant being heard; or are such as are granted upon hearing both plaintiff and de-

¹ See Joyce on Injunctions, 2, note.

² 1 Spence Eq. 107, note *e*. The writ ran as follows; "Henricus Rex Anglorum Haimoni Dapifero et Hugoni de Bock, salutem, Prohibeo ne piscatores pescant in Tamesia, ante piscaturam de Rovecestra de Nivvera, et si ulterius invenientur piscantes, sint mihi forisfacti."

³ The Burgesses of East Retford v. Thomas de Hercy, Chan. Cal. ix. and x.; Astel v. Causton, *Id.* cviii.; Edyall v. Hunston, *Id.* cxiii.; Peverell v. Huse, *Id.* cxxii.; Royall v. Garter, *Id.* cxxx.; Hoigges v. Harry, *Id.* xxiv.; *ante*, p. 10, 11.

⁴ Kerr on Injunctions, Chap. II.

fendant.¹ An *ex parte* injunction is only granted where, in urgent cases, delay might produce irreparable injury to property, or in urgent cases to restrain proceedings at law. It may be granted before the defendant's appearance and without notice to him.² The defendant, however, is always given an early opportunity to come in and move to dissolve the injunction.

405. Again; injunctions are (or rather *were*) either common or special. The common injunction was one which was granted in aid of or secondary to another equity, as in the case of injunctions to restrain proceedings at law, and it issued of course upon the coming in of the bill, without notice.³ As soon, however, as the defendant files his answer, he may move to dissolve the injunction; and it is then a question for the discretion of the court whether, on the facts disclosed by the answer, or, as it is technically termed, upon the equity confessed, the injunction shall be at once dissolved, or whether it shall be continued to the hearing.⁴

If the common injunction is obtained before the declaration has been filed in the action at law which the injunction seeks to restrain, it stays all further proceedings in that action. If obtained after the declaration, the defendant (the plaintiff in the action at law) is permitted to go on to judgment, but the injunction stays the execution. If the defendant requires discovery to aid him in the trial at law, proceedings will be stayed on special application, until the coming in of the answer.⁵

The common injunction has been practically abolished in England; as such injunctions are no longer of course, but are granted only upon a bill which makes out a *prima facie* case, and which must be supported by affidavit.⁶ In the United States, as a general rule, the common injunction does not exist; but all injunctions are granted on the merits.⁷

Special injunctions are those which are granted upon the

¹ Joyce on Injunctions, 1.

² *Id.* 2.

³ High on Injunctions, § 6.

⁴ Hoffman v. Livingstone, 1 Johns. Ch. 211.

⁵ Adams's Doct. of Equity, 195.

⁶ Stat. 15 & 16 Vic., c. 86, § 58 (Chan-

cery Procedure Act, 1852); Smith's Manual of Equity, 411; Joyce on Injunctions, 1.

⁷ Buckley v. Corse, Saxton, 504; Perry v. Parker, 1 Wood & Min. 280; High on Injunctions, § 6.

merits as disclosed by affidavits. The allowance of a special injunction rests in the sound discretion of the court. It is granted only on special application, though it may be *ex parte*; and it is usual in the United States to require security before issuing the writ.¹

406. The nature of the writ of injunction having been thus briefly noticed, the occasions for the exercise of this equitable remedy must be considered.

The object of the remedy being to prevent an infringement of *rights*, the general division of the subject may naturally be into those cases in which the writ issues for the purpose of protecting equitable rights, and those in which it issues for the purpose of preventing injury to legal rights.

The first class of cases may be subdivided into those in which the writ issues for the protection of equitable rights by enjoining proceedings at law, whereby and wherein such rights may be violated or disregarded, and those in which the writ issues for the protection of such equities when injury is threatened by other means than through legal proceedings—as where the rights of legatees, partners, *cestui qui trustent*, mortgagors, and others are in danger of being violated by the executor or administrator, copartner, trustee, or mortgagees, as the case may be.

407. And first as to the protection of equitable rights by enjoining proceedings at law.

It is well established that equity will interfere to restrain proceedings at law, wherever through fraud, mistake, accident, or want of discovery one of the parties in a suit at law obtains, or is likely to obtain an unfair advantage over the other, so as to make the legal proceedings an instrument of injustice.² The

¹ High on Injunctions, Chap. XXI; Foster, 4 Allen, 545; Hine v. Handy, 1 Daniels Chan. Prac. 1776. See Bein v. Johns. Ch. 6; Atlantic De Laine Co. v. Heath, 12 Howard, 168. Instances may occur in which it is not necessary to give security; Dodd v. Flavell, 2 C. E. Green, 255.

² Earl of Oxford's Case, 1 Ch. Rep. 1; 2 Lead. Cas. Eq. 601 (4th Eng. ed.). See, also, Lyme v. Allen, 51 N. Hamp. 242; Ferguson v. Fisk, 28 Conn. 501; Weed v. Grant, 30 Id. 74; Dehon v. Bulows v. Committee of O'Neill, 4 Desaus. 894; Vennum v. Davis, 35 Ill. 568; Davis v. Hoopes, 33 Miss. 173; Daniell's Chan. Prac. 1725. See Ochsenbein v. Papelier,

ground of this interference is that in order to do complete justice every part of the dispute between the parties should be passed upon.¹ Now, in the common law courts, the rights of parties could, in many instances, receive only a partial consideration, as those courts could not adjudicate equities, and thus only a part of the dispute could actually be decided. It was to afford a remedy to this wrong that chancery interfered and assumed jurisdiction to stay legal proceedings. This jurisdiction is exercised at any stage of the legal cause. Thus an injunction is sometimes granted to stay trial; sometimes after verdict to stay judgment; sometimes after judgment to stay execution; and sometimes after execution to stay the money in the hands of the sheriff if it is a case of *feri facias*,² or to stay the delivery of possession if it is a writ of possession. It is usually granted on the application of the defendant, but the plaintiff may have an injunction, as where a verdict has been rendered against the plaintiff by inequitable means, he may come into chancery to prevent the entry of judgment, and to get a new trial.³

The right of the court of chancery to exercise this jurisdiction, especially after judgment, was the occasion of the well-known dispute in the reign of James I., between Lord Chancellor Ellesmere and Lord Chief Justice Coke. An action had been tried in the King's Bench, in which the plaintiff lost his verdict in consequence of one of his witnesses being artfully kept away. He then came into chancery, praying discovery from the defendant. The latter refused to answer and was committed to prison for contempt. Indictments were then preferred (at the instance of Coke), against the complainant and his counsel; but they were thrown out by the grand jury. The king then interfered in favor of the chancellor, and made an order on his

Law Times, May 31, 1878, where the application of the rule to proceedings on foreign judgments was discussed. The injunction in this case was refused. See upon this subject High on Injunctions, Chap. II., § 2.

¹ Kerr on Injunctions, 13.

² The common injunction, if obtained after declaration, did not stay proceed

ings at once, as the plaintiff in the common law action was at liberty to go on until verdict and then stop. If the injunction was obtained before declaration, it stayed proceedings at once.

³ Or a plaintiff may file a bill to restrain a defendant from setting up a plea. *Stewart v Railroad Co.*, 2 De G. J. & Sm. 319.

council book, declaring that he had not exceeded his jurisdiction, and the parties who had preferred the indictment were prosecuted in the star chamber.¹

Since this dispute the general right of chancery to interfere by injunction, for the purpose of preventing an inequitable use of legal process, has not been questioned in England, and the same rule exists in the United States.

408. It is important to remember that in granting this relief, equity does not pretend or assume to interfere with another court. The injunction is in *personam* merely. It is directed to the *party*, not to the court, or the officers thereof. It is not, in other words, a writ of prohibition.² An injunction, for example, restraining an execution, would not issue to the prothonotaries or clerks of the common law court, wherein the judgment had been obtained, but to the plaintiff in the action, forbidding *him* to take any steps towards getting out a writ of execution, and disobedience to this injunction would be a contempt on the plaintiff's part and punishable accordingly.

409. It is difficult to mark out with precision the exact limits within which a court of equity will interfere with proceedings at law. Some general principles, however, have been well established; and certain recognized cases exist in which the jurisdiction of chancery is assumed.

It may be said on high authority that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself in a court of law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.³ If the defence is equally

¹ Earl of Oxford's Case, 1 Ch. Rep. 1; the plaintiff had lost a verdict in a common law action through a failure of evidence. After the judgment in the common law action, a statute was passed allowing parties to testify. The plaintiff then filed a bill in chancery for a new trial, alleging that he could, under the new law, make out his case. The relief, however, was refused. See, also, Duncan v. Lyon, 3 Johns. Ch. 356; Hibbard v. Eastman,

² Kerr on Injunctions, 14, 15. See Moore v. Browne, a case in the Register's Book of the Early Court of Chancery in the Colony of Pennsylvania, p. 31. Appendix to Rawle's Essay on Equity in Pennsylvania, p. 20.

³ Marine Ins. Co. v. Hodgson, 7 Cranch, 832. In Brown v. Hurd, 56 Ill. 317,

available in a court of law, and no special ground exists growing out of fraud or accident, equity will not interfere.¹ The principle is that as between concurrent jurisdictions that which first attaches will have the preference.² The necessity for equitable interference has been very much lessened by the facility with which verdicts are set aside, new trials granted, and judgments opened in courts of common law.

In England, by the common law procedure act of 1854, power is given to the common law courts to entertain defences by plea on equitable grounds. But the powers given by this act are permissive only and not compulsory; and a party has the option either to avail himself of the equitable defence at law, or to go into chancery for relief.³ He cannot, however, do both; and after he has once exercised his option by using an equitable plea at common law, and there is no reason why the court of law should not deal with the equitable plea as well as a court of equity, and give him the same relief as a court of equity, he cannot ask for an injunction on the very ground that he has made the subject of his equitable plea.⁴ But if the court of law refuses to take cognizance of the equitable defence, on the ground that it is not within the statute, or the relief afforded is not adequate, or from the way in which the pleadings are framed, the case cannot be heard on its merits; equity, in such cases, will interfere.⁵

It is a question of some doubt whether the assumption of equitable principles by common law courts makes any difference in the right of courts of equity to interfere by injunction. It has been decided in New York and Vermont, that the execution of a judgment might be restrained on equitable grounds, although those grounds would, under the modern liberality of common law courts, have been entertained at law, and would

47 N. Hamp. 507; *Robinson v. Wheeler*, over *v. The Mayor*, 25 Barb. 518; *Crane v. Bunnell*, 10 Paige, 333.
51 *Id.* 384. See, however, *Norton v. Woods*, 5 Paige Ch. 249; and *Miller v. McCan*, 7 *Id.* 451.

¹ *Linn v. Neldon's Admrs.*, 8 C. E. Green, 169; *Lyme v. Allen*, 51 N. Hamp. 242.

² See *South Eastern Railway Co. v. Brogden*, 3 MacN. & G. 23; *Hoare v. Bembridge*, L. R. 8 Ch. App. 22; Con-

³ *Gompertz v. Pooley*, 4 Drew. 448; *Davies v. Stainbank*, 6 De G. M. & G. 679; *Kerr on Injunctions*, 25, 26.

⁴ *Waterlow v. Bacon*, L. R. 2 Eq. 514; *Farebrother v. Welchman*, 3 Drew. 122.

⁵ *Magnay v. Mines Royal Co.*, 3 Drew. 130; *Evans v. Bremridge*, 8 De G. M. & G. 100; *Waterlow v. Bacon*, L. R. 2 Eq. 514.

have constituted a good defence there. This line of decisions is based on the general doctrine that the jurisdiction of equity will not be ousted by any subsequent assumption of similar jurisdiction by common law courts.¹ In other decisions a contrary rule has been held; and it has been decided that equity would not interfere where the defence might have been taken in the ordinary course of legal proceedings.² And where the powers of courts of common law to entertain equitable defences have been conferred by statute, the reason for the interference of chancery would seem no longer to exist.³

The fact, however, that a court of law has concurrent jurisdiction with a court of equity, will not prevent the latter from interfering wherever from the special circumstances of the case complete justice could not be done in the former tribunal.

410. The cases which warrant the interference of courts of equity with the parties to a legal proceeding, are coextensive with the subjects of equitable jurisdiction. It may be said, generally, that an injunction will be granted to restrain an action at law wherever an equitable title is not recognized, or an equitable right not enforced, or where exact and complete justice would not be done between the parties by reason of the want of an equitable remedy. Thus, by running over the heads of equitable jurisdiction, which are pointed out in this work, it will be seen what are the occasions upon which the writ of injunction to stay proceedings at law may issue.

Thus, if a trustee were to assert his legal title by ejectment against the beneficial owner, equity would interfere by injunction. And the remedy applies to implied as well as express trusts.⁴

Equity will also restrain suits at law whereby or wherein the equitable titles growing out of mortgages, and the assignment of *choses in action*, are likely to be disturbed or disregarded.⁵

¹ *King v. Baldwin*, 17 Johns. 384; 1 Ham. 490; *Symons v. Reid*, 5 Jon. Eq. overruling Chancellor Kent in 2 Johns. 327; *North Am. Coal Co. v. Dyett*, 7 Ch. 554; *Viele v. Hoag*, 24 Verm. 46. Paige, 1; *Kerr on Injunctions*, Chap. XI.

² *Dickerson v. The Commissioners*, 6 Ind. 128.

³ *Winfield v. Bacon*, 24 Barb. 154.

⁴ *Trenton, etc. v. McKelway*, 4 Halst. Ch. 84. See, also, for other instances of relief in cases of trust, *Hunt v. Freeman*,

⁵ *Kerr on Injunctions*, Chap. XIV. See, also, *Hubbard v. Jasinski*, 46 Ill. 160; *Clagett v. Salmon*, 5 Gill & Johns. 314; *Curd v. Wunder*, 5 Ohio St. 92; *Smithurs v. Edmunds*, 1 McCart. 408.

411. It has been explained in a former part of this work that certain equitable rights or "equities" grow out of accident, mistake, and fraud; and the nature of these different heads of jurisdiction, and the circumstances under which these equities will be enforced, were attempted to be pointed out and discussed. In addition to the general relief which is afforded by bills filed expressly to assert these equities, a court of chancery will interfere by injunction to restrain parties from asserting legal rights by action at law to the prejudice of equitable rights. Thus, if an instrument which forms the evidence of the title of a party, has been lost through accident, the relief required will obviously differ with the position of the plaintiff in respect to the property. If he is out of possession, he will obtain complete relief by filing a bill, because the decree will then be evidence of his title. But if he is in possession, and is the defendant in an action at law, the only relief which he needs is an order restraining the other party from setting up *his* title. This can be accomplished only by the writ of injunction; which may accordingly be obtained in such a case.¹ This instance will serve to show the necessity for this species of equitable remedy in the three cases of accident, mistake, and fraud. It may be added here that to obtain complete justice it is sometimes necessary that the re-execution or reformation of documents should be ordered, or that instruments should be delivered up and cancelled. This subject will be noticed in the succeeding chapter.

The writ of injunction is also used for the purpose of protecting and enforcing the equities of notice, estoppel, conversion, election, and adjustment, wherever those rights are in danger of being injuriously affected by the proceedings of a common law court. Thus a party may be restrained by injunction from asserting in an action at law a legal title against an equitable title of which he had notice; or from setting up some right or title from the enforcement of which he ought to be estopped in equity by some previous conduct or action on his part; or from violating in common law actions rights acquired under the equitable doctrines of conversion and election; or from disturbing those rights and duties which grow up under the general head

¹ See *Butch v. Lash*, 4 Iowa, 215.

of adjustment, and exhibit themselves in the equities of subrogation, exoneration, contribution, and marshalling.¹

412. Injunctions to restrain proceedings at law are granted not only in those cases in which equitable titles or equitable rights are in danger of being disregarded; but, also, in some instances where more complete justice between the parties may be effected by an equitable remedy. Thus a man against whom an action has been brought for a matter of account, or for that which is the result of an account, has a right, on making out a proper case, to ask a court of equity to have an account there taken, on the ground that the remedy at law is less complete than the remedy in equity. As a corollary to this right the complainant has the further privilege of asking for an injunction to restrain the common law court from proceeding with the action of account—if any has been there instituted.²

So, too, where one of the parties to a common law action desires to obtain discovery from his adversary, the jurisdiction of a court of chancery will be exercised to restrain the other party from proceeding with the action until discovery is obtained.³

When the equitable remedy by specific performance has been invoked, the court will not permit an action at law to proceed for the same subject matter. The complainant, therefore, will be restrained from proceeding at law for damages.⁴

413. A court of equity frequently interferes by injunction to restrain proceedings at law for the purpose of preventing unnecessary or vexatious litigation. This it does by compelling a party to elect between two remedies; by restraining a party from bringing an action in another court after a court of equity has once obtained possession of a cause; by putting a stop to repeated attempts to litigate the same question; and by inter-

¹ See Joyce on Injunctions, 1053 (Part II.); note to Earl of Oxford's Case, 2 Lead. Cas. Eq. 613 (4th Eng. ed.).

² Anderson v. Noble, 1 Drew. 143.

³ Wynne v. Jackson, 2 Russ. 351; Lord Portarlington v. Soulby, 3 M. & K. 104; Kerr on Injunctions, 27, 28.

⁴ Duke of Beaufort v. Glynn, 3 Sm. &

Giff. 213; Reynolds v. Nelson, 6 Mad. 18; Prothero v. Phelps, 2 Jur. N. S. 173. It must be remembered that sometimes specific performance is refused, but the complainant is remitted to his common law rights. Of course, in such a case an action for damages would not be restrained.

fering to protect a party who is liable to discharge some debt, duty, or obligation from vexatious suits, by two or more parties severally claiming to be entitled to the benefit of such debt, duty, or obligation.

As to the first of the above instances of equitable interference it will be sufficient to say, that a court of chancery will not permit a man to proceed both at law and in equity at the same time in respect of the same demand, but will compel him to elect in which court he will proceed.¹ To this rule there appears to be but one exception—viz., the case of a mortgagee who is entitled to enforce all his remedies at once. He may foreclose the mortgage, and, at the same time, proceed upon the accompanying bond.²

414. After a court of equity has once got possession of a cause, it will not suffer any of the litigating parties to resort to another tribunal. Either a plaintiff or defendant who attempts to do so, may be restrained by a motion in the cause.³ Thus a man who has filed a bill for specific performance is bound to submit his claim for damages to the judgment of the court, and may not proceed at law otherwise than by leave of the court.⁴ And so, also, in a suit for the administration of assets, after a decree has been made, the court will not suffer a creditor to institute proceedings at law. Before a decree is made, under which a creditor may come in and prove his debt, the court will not hinder a creditor from pursuing his legal remedies. But, after such a decree is entered, he may be restrained from the action at law.⁵

415. Equity interferes by injunction to restrain repeated attempts to litigate the same right. Cases of this kind are usually grouped together in one class, under the head of bills of peace. These bills of peace are of two kinds, and are filed either (first) to prevent the vexatious recurrence of litigation by a numerous class insisting upon the same right; or (second) to

¹ *Hogue v. Curtis*, 1 J. and W. 429; *Fennings v. Humphery*, 4 Beav. 1; Kerr on Injunctions, 103.

² *Schoole v. Sall*, 1 Sch. & Lef. 176; *Taylor v. Waters*, 1 My. & Cr. 266; Kerr on Injunctions, 105, 106.

³ *Reynolds v. Nelson*, 6 Madd. 18; *Frank v. Basnett*, 2 My. & K. 618.

⁴ *Reynolds v. Nelson*; *Frank v. Basnett*,

supra.

⁵ Kerr on Injunctions, 107.

prevent the same individual from reiterating an unsuccessful claim.¹

Bills of peace of the first class occur where there is one general common right to be established against several or a number of distinct persons, whether one person claims or defends a right against many, or many claim or defend a right against one. In such a case a court of equity will interfere to prevent multiplicity of suits, and instead of suffering parties to be harassed by a number of separate suits, each of which only decides the particular right in question between the plaintiff and defendant thereto, will at once determine the general right by decree. The instances of such bills, usually given, are where the lord of a manor claims a right against the tenants, or the tenants claim a common right against the lord; or where a parson claims tithes against his parishioners, or the parishioners allege a *modus* against the parson.²

416. An instance of a more practical character, in modern times, occurred in the case of the *Sheffield Water Works v. Yeomans*.³ The reservoir of the Sheffield Water Works had burst and occasioned an inundation, by which the property of a large number of persons had been injured. Under an act of Parliament, passed to meet the case, certificates for costs were to be issued to the property owners, which entitled the holder, after compliance with certain formalities, to a claim against the company in the nature of a judgment. A difference of opinion afterwards arose between the commissioners as to whether their powers had not expired; and a large number (1500) of certificates were delivered by some of the commissioners to Yeomans, who was the town clerk, for distribution. A bill was then filed against Yeomans and five of the persons named in the certificates on behalf of themselves and of all others; and a demurrer to this bill was overruled. "It seems to me," said Lord Chancellor Chelmsford, "to be a very fit case, by analogy at least, to a bill of peace, for a court of equity to interpose and prevent the unnecessary expense and litigation which would be thus occasioned, and to decide, once for all, the validity or invalidity of the certificates upon which the rights of all the parties depend."⁴

¹ Adams's Doct. of Equity, 199.

³ L. R. 2 Ch. App. 8.

² *Id.*

⁴ *Id.* 11.

417. In general, in order that a bill of peace may be maintained, the complainant must have first established his right at law; and a court of equity will, if necessary, direct an issue to be tried for this purpose.¹

To sustain a bill of peace the right must be one common to all; hence such a bill will not lie against independent trespassers who have no common claim—as, for example, against several booksellers who have infringed a copyright, or against several persons who have at different times obstructed a ferry.²

Nor will a bill, in the nature of a bill of peace, lie to enjoin the enforcement of a tax under the revenue laws, in favor of a number of persons, joined as complainants, whose only interest in common is in resisting the tax, they having no common interest in the subject on which it is levied.³

When a bill of peace is filed for the purpose of establishing a right in which many are interested, it must be filed on behalf of all, and will not lie to establish the right of the complainant only.⁴

Thus one commoner may file a bill on behalf of himself and of all others to establish a right of common, as against the lord; but he cannot file a bill to establish simply his individual right. The answer to such a complainant is: “if this is a disturbance of your common, why do you not bring your action? You may maintain an action; prove your right of common, prove that the lord has invaded that right, and you will recover at law.”⁵

It is enough, however, if one general question exists which is to be determined. Thus, where a person was in possession of land with a complete legal title, though not all appearing of record, it was held that he was entitled to an injunction to re-

¹ *Tenham v. Herbert*, 2 Atk. 484; *v. Grandy*, 13 Mich. 540; *McHenry v. Mitford's Pl.* 169; *Edridge v. Hill*, 2

Johns. Ch. 281; *Bond v. Little*, 10 *Georgia*, 395; *Morgan v. Smith*, 11 Ill. 194; *Gunn v. Harrison*, 7 *Alab.* 585; *Lowe v. Lowry*, 4 *Ham.* 77; *Harmer v. Gwynne*, 5 *McLean*, 313; *Patterson, etc. R. R. Co. v. Jersey City*, 1 *Stockt.* 434; *Smith v. McConnell*, 17 *Ill.* 135.

² *Adams's Doct. of Eq.* 200. See, also, *Randolph v. Kinney*, 3 *Rand.* 394; *Miller*

Hazard, 45 *Barb.* 657.

³ *Cutting v. Gilbert*, 5 *Blatch.* 259; *High on Injunctions*, 213.

⁴ *Phillips v. Hudson*, L. R. 2 *Ch. App.* 243.

⁵ *Phillips v. Hudson*, L. R. 2 *Ch. App.* 248. See, also, *Eldridge v. Hill*, 2 *Johns. Ch.* 281; *Tenham v. Herbert*, 2 *Atk.* 488; *Cowper v. Clerk*, 3 *P. Wms.* 155; *High on Injunctions*, § 54.

strain a number of ejectment suits brought against him as to a portion of the premises, since the question was the same as to all of the premises, and might be determined by the proceeding in chancery.¹ But where the relief can be equally afforded by a court of law by means of an order consolidating the suits, an injunction will be refused.²

418. Bills of peace of the second class, viz., those wherein the plaintiff seeks to restrain the defendant from reiterating an unsuccessful claim, originated in the fact that a verdict in an action of ejectment was not conclusive upon the rights of the real parties to the controversy, and successive actions might therefore be brought indefinitely upon the same title. In some of the United States this rule has been altered, and two verdicts in favor of the same title are deemed conclusive upon the right. In order, however, to remedy the evil as it existed at common law, chancery entertains a bill to enjoin further litigation, after repeated trials at law. This jurisdiction was established by a decision of the House of Lords in the case of the *Earl of Bath v. Sherwin*, and is now unquestionable.³

419. The only instance wherein a court of equity interferes to prevent vexatious litigation, which yet remains to be noticed, is the case wherein a bill is filed to protect a party who is liable to discharge some debt, duty, or obligation from suits by two or more persons severally claiming to be entitled to the benefit of such debt, duty, or obligation. Bills for this object are called bills of interpleader. The ground upon which this jurisdiction rests is that a mere stakeholder ought to be protected as against

¹ *Woods v. Monroe*, 17 Mich. 281. It is a well established rule in equity pleading, that in certain cases bills may be filed by one or more persons on behalf of themselves and all others standing in a similar position and claiming the same right. Of these suits, bills filed by one or more creditors for the administration of the estate of a decedent, or of a bankrupt, and bills filed by one or more stockholders in a company against projectors or directors, are instances. The subject will be found

discussed in Story's Equity Pleading. §§ 97-136.

² *Peters v. Prevost*, 1 Paine, C. C. 64.

³ *Earl of Bath v. Sherwin*, 4 Bro. P. C. (Tomlin) 373. See, also, *Barefoot v. Fry*, Bunb. 158; *Marsh v. Reed*, 10 Ohio, 347; *Craft v. Lathrop*, 2 Wall, Jr. 103; *Dedman v. Chiles*, 8 Monr. 426; *Pater-son, etc. R. R. Co. v. Jersey City*, 1 Stockt. 434; *Patterson v. McCamant*, 28 Missouri, 210.

conflicting claimants.¹ The justice of this rule was recognized at common law, but its application was exceedingly limited, being confined to the old actions of *quare impedit*, and writ of right of ward, and to the single personal action of detinue, and then only in the two cases of bailment and accident.²

The right of interpleader at law has been extended in England³ and in many of the United States by statute; but in some of the States the remedy is in equity alone, and in others the equitable remedy is necessarily invoked in some cases.⁴

¹ *Crawshay v. Thornton*, 2 My. & Cr. 1; *Kerr on Injunctions*, 118 *et seq.*; *Farley v. Blood*, 10 Foster, 354; *Bedell v. Hoffman*, 2 Paige Ch. 199; *Cady v. Potter*, 55 Barb. 468; *Lincoln v. Rutland R. R. Co.*, 24 Verm. 639; *Mount Holly Co. v. Ferree*, 2 C. E. Green, 117; *Strange v. Bell*, 11 Georgia, 103; *Burton v. Black*, 32 *Id.* 53; *Hathaway v. Foy*, 40 Missouri, 540.

² *Story's Equity Jurisp.*, §§ 801-804. The common law process of garnishment was in the nature of an interpleader. It arose in this way: When deeds were deposited in the hands of a third person to await the performance of covenants, or the doing of some act upon which they were to be re-delivered to one or other of the parties, actions of detinue were often brought against the depository, whenever the crisis happened for the deeds being demandable according to the terms of the agreement on which they were deposited. In these actions the defendant would be driven to call in the other party to the agreement and deposit, that the re-delivery might be made to the person who had a legal right to call for it from the defendant. Thus, in an action of detinue for such deeds delivered by the plaintiff to the defendant to be re-delivered, the defendant would plead that they were delivered by the plaintiff and one J. N. upon certain conditions, and he did not know whether the conditions were performed; therefore he prayed *garnishment*

against J. N., that is, that J. N. might be summoned to show whether there had been a performance of the conditions. Upon this a *scire facias* would issue against J. N., who under the name of *garnishee* became defendant in the suit, the first defendant being considered as out of court by the garnishment. 2 *Reeves's Hist. Eng. Law*, pp. 635, 636 (Finlason's ed.).

³ 1 & 2 Wil. IV., c. 58; 1 & 2 Vic., c. 45, § 2; 23 & 24 Vic., c. 126, § 12. See *Best v. Hayes*, 1 Hurl & Colt, 718; *Tanner v. European Bank*, L. R. 1 Exch. 261; *Kerr on Injunctions*, 120. If one of the claims is legal, and another equitable, the statutes do not apply, and the remedy is exclusively in equity. *Kerr on Injunctions*, 120.

⁴ In *Ramsdell v. Butler*, 60 Maine, 216, the plaintiff, who was one of two claimants of a fund in the hands of the defendant, was nonsuited on the ground that his remedy was in equity, and not at law. "If, in a case like this," said Walton, J., "one of the claimants could sue the trustee, so could the other; and as neither would be a party to the other's suit, a recovery in one would be no bar to a recovery in the other; and in this way the defendant might, by the verdict of different juries, be compelled to pay double the amount he received with two bills of costs added. The law does not tolerate the possibility of such a result." This line of reasoning would seem to do away

420. A bill of interpleader must show title in two claimants. Thus a sheriff who seizes goods on execution cannot file a bill of interpleader to determine adverse claims existing to the property; for the defendant in the execution has no right to hold against the sheriff's levy; whereas, so far as the adverse claimant is concerned, the sheriff is simply a wrongdoer. It has, therefore, been found necessary to protect sheriffs under these circumstances by special statutes.

But where the contest is between the execution creditor and a party who claims title to the *fund* realized by a sheriff, a bill of interpleader will lie. Thus in *Child v. Mann* the sheriff, who was in possession of goods under a *fiery facias*, was served with notice of an adjudication in bankruptcy against the debtor, and notice by the assignee to quit possession. The execution creditor then obtained an order on the sheriff to make return of the writ, and the sheriff then sold the goods. It was held that the sheriff was entitled to file a bill of interpleader against the assignee and the plaintiff in the execution.¹

An agent or attorney cannot compel his principal and a third party to interplead, nor can a tenant maintain an interpleader bill against his landlord and a stranger; the reason in these cases being that the attorney, or agent, or tenant cannot be permitted to controvert the title of the party under whom he holds.² The possession of a tenant is the possession of the landlord, and it would be exceedingly unjust and vexatious to allow the tenant to put his landlord on the same footing as a stranger. But a tenant may always show that his landlord has parted with his title, and hence he may file a bill of interpleader against his landlord, and one who claims derivatively from the landlord by a conveyance subsequent to the commencement of the tenancy.³

421. A bill of interpleader will not lie where the plaintiff claims an interest in the subject matter himself. Thus, if an

with the necessity for bills of interpleader as filed by the stakeholder, and render it obligatory upon one of the claimants to resort to equity.

v. Burntrager, 1 Cart. 165; *Whitewater, etc. Co. v. Comegys*, 2 Id. 469; *Nickolson v. Knowles*, 5 Madd. 47; *Kerr on Injunctions*, 122.

¹ *Child v. Mann*, L. R. 3 Eq. 806.

³ *Crawshay v. Thornton*, 2 My. & Cr.

² *Cook v. Roselyn*, 1 Giff. 167; *Crane* 1, 21; *Stuart v. Welch*, 4 My. & Cr. 305.

action is brought against an auctioneer for a deposit, he cannot maintain a bill of interpleader if he insists upon retaining either his own commission or the duty.¹

So, also, where an interpleader bill alleged that the interest on a sum secured by a policy is not due from the company by whom the bill was filed, it was held not sustainable.²

It is not necessary that the title of both the claimants be legal; one title may be legal and one equitable, or both equitable.³ It is essential to an interpleader that the party seeking relief should have incurred no independent liability to either party, and should have acknowledged the title of neither. If he has come under any personal obligation to either of the claimants in respect of the specific property in dispute, independently of the question of title, so that the whole of the rights claimed by the defendants cannot be properly determined by litigation between them, it is not a proper case for interpleader.⁴ The cases of landlord and tenant, and principal and agent, already stated, are illustrations of this rule.

422. It is also essential that the debt duty, or thing claimed by both parties, should be the same. Thus, where a purchaser of tea was sued by the seller for the price, and was also sued in trover by the person who alleged himself to be the real owner, it was held not to be a case of interpleader, for the parties were not seeking the same thing. The one was endeavoring to obtain the price of the goods, the other damages for their conversion.⁵

So also where an auctioneer, by direction of the owner, had sold to two persons successively, and had received a deposit from each, it was held that the auctioneer could not support a bill of interpleader against the owner, and the two purchasers; because, although there was one question in common between the purchasers, viz., which was to be the purchaser of the estate, their claims against the auctioneer were for two different things, viz.,

¹ *Mitchell v. Hayne*, 2 Sim. & St. 63.

² *Bignold v. Audland*, 11 Sim. 23.

³ See *Hamilton v. Marks*, 5 De G. & Sm. 638; *Lozier's Exrs. v. Van Saun's Admrs.*, 2 Green Ch. 325; *Yates v. Tisdale*, 3 Edw. Ch. 71.

⁴ *Crawshay v. Thornton*, 2 My. & Cr.

1; *Pearson v. Cardon*, 2 Rus. & Myl. 606;

Cochrane v. O'Brien, 2 Jo. & Lat. 308;

Desborough v. Harris, 5 De G. M. & G. 439, 455.

⁵ *Slaney v. Sidney*, 14 Mees. & Wels. 800.

by each for his own deposit. The bill was, therefore, dismissed as against the second purchaser with costs, and it was decreed that the seller and the first purchaser should interplead as to the first deposit.¹

It is not necessary to sustain a bill of interpleader that an action be actually commenced. It is sufficient if claims have been made against the complainant, and he is threatened with a double vexation.²

423. Under the act of Congress of March 2, 1867, to "Establish a Uniform System of Bankruptcy throughout the United States," injunctions may be granted to stay proceedings at law, both for the benefit of the creditors of the debtor, and for the benefit of the debtor himself. Thus the federal District Courts may interfere, by injunction, in cases of involuntary bankruptcy, to restrain the debtor and any other person, during the pendency of the rule to show cause, from making any transfer or disposition of the debtor's property, and from any interference therewith; and the circuit courts have the power to hear and determine as courts of equity all cases and questions arising under the act.³ Under these sections a creditor may be restrained from using the process of State courts, where its use would violate or defeat the provisions of the bankrupt act. As, for example, if a plaintiff in a judgment were proceeding by execution, when the judgment was confessed, or the levy thereunder procured to be made with the knowledge on the part of the plaintiff that the defendant was insolvent, or in contemplation of insolvency, and with the intent to give a preference, or to defeat or delay the operation of the act. This jurisdiction may be exercised sometimes by the District Court under the provisions of the 40th section, and sometimes by the Circuit Court by virtue of the equity powers conferred by the 2d section.⁴

An injunction to restrain an action at law may also be obtained for the benefit of the bankrupt, by virtue of the provisions of the 21st section of the act, which provides that no creditor whose

¹ Hoggart v. Cutts, Cr. & Ph. 197.

² Kerr on Injunctions, 120.

³ Act of Congress of March 2, 1867, §§ 2 and 40.

⁴ Irving v. Hughes, 7 Am. Law Reg. (N. S.) 209; High on Injunctions, Chap. IV. See, under the English act, *Ex parte Rumboll*, L. R. 6 Ch. App. 842.

debt is provable under the act shall prosecute to final judgment any suit at law or in equity therefor, until the question of the debtor's discharge shall have been determined. Before the election of an assignee this injunction can be obtained only by the bankrupt; after such election the assignee is the proper party to apply.¹

424. Before leaving the subject of injunctions to restrain proceedings at law, it will be proper to say a few words as to the question "what are the courts in which proceedings will be restrained?"

Equity will interfere not only in proceedings in common law courts, but also to restrain parties to proceedings in ecclesiastical courts,² in courts of admiralty,³ in foreign courts,⁴ and in courts of bankruptcy to the extent of restraining a party from commencing proceedings in bankruptcy,⁵ but not to the extent of interfering with the distribution of the bankrupt's estate after the jurisdiction of the bankrupt court has once attached.⁶ Nor will a court of chancery restrain proceedings in a court of admiralty, where the latter tribunal has full power and jurisdiction to examine the matter.⁷

Proceedings in criminal courts will not be interfered with by injunction, unless the proceedings are commenced by a person who is also plaintiff in equity, relative to the same matter.⁸

Courts of equity are, in general, unwilling to interfere with tribunals which derive their authority from a distinct and independent source. For instance, a court of one State is slow to interfere with the tribunals of a sister State, and federal courts

¹ Brightly's Bankrupt Act, 49.

² Hill v. Turner, 1 Atk. 515.

³ Glascott v. Lang, 3 My. & Cr. 451; 2 Phillips, 310; Jarvis v. Chandler, T. & R. 319.

⁴ Lord Portarlington v. Soulby, 3 My. & K. 108 (disapproving of Lowe v. Baker, Freem. 125); Bunbury v. Bunbury, 1 Beav. 318; The Carron Iron Co. v. Maclaren, 5 H. L. Cas. 416; Graham v. Maxwell, 1 MacN. & G. 71; Baillie v. Baillie, L. R. 5 Eq. 175; Hope v. Carnegie, L. R. 1 Ch. App. 320; Dehon v.

Foster, 4 Allen, 545; Great Falls Co. v. Worster, 3 Foster, 462. In Liverpool, etc., Co. v. Hunter, L. R. 4 Eq. 62, and In re Chapman, L. R. 15 Eq. 75, an injunction was, under the circumstances, refused.

⁵ Attwood v. Banks, 2 Beav. 192.

⁶ Thompson v. Derham, 1 Hare, 358; Morley v. White, L. R. 8 Ch. App. 214.

⁷ Anon., 3 Atk. 350.

⁸ Holderstaffe v. Saunders, 6 Mod. 16; The Mayor of York v. Pilkington, 2 Atk. 302.

with State courts.¹ But this is a rule of comity only, and cannot, therefore, be regarded as a principle to which courts of equity would feel bound under all circumstances to adhere.

A court of equity may sometimes restrain proceedings in another court of equity.

Thus, where there were two claimants of a fund, and one filed a bill against the stakeholder without making the other a party, the stakeholder was held to be entitled to file an interpleader bill, and restrain the proceedings in the former suit.²

A court of equity will not interfere to restrain the exercise of executive discretion.³

425. It was stated above that equitable rights are liable to be infringed in two ways, first (indirectly), by being disregarded in the proceedings at law, and secondly (directly), by some act injurious to the equity. Having noticed the first general class of cases, it will be desirable now to pass to a brief consideration of the second.

It may perhaps be stated as a general rule, that as a court of chancery will interfere to redress an injury to an equitable right, it will also interpose its preventive remedy by injunction whenever such rights are threatened. Thus equity will interfere to prevent a breach of trust, it will restrain an improper or imprudent disposition of trust assets on the application of the *cestui qui trust*; or a co-trustee may invoke the aid of the court to prevent a threatened breach of trust.⁴ Injunctions may, upon the same principles, be issued against executors, when the assets of an estate are endangered by their mismanagement.⁵

Equity will also interfere to protect the rights of the holder of an equitable title. Thus a creditor of a husband may be restrained from levying upon the separate equitable estate of a married woman;⁶ and in Pennsylvania it has been held that the

¹ *Diggs v. Wolcott*, 4 Cranch, 179. The federal courts are forbidden to *stay proceedings* in any State court. Act of 1793, ch. 22, § 5; 1 Stat. at Large, 335.

² *Prudential Assurance Co. v. Thomas*, L. R. 3 Ch. App. 74.

³ *State of Mississippi v. Johnson*, 4 Wall. 475.

⁴ *Scott v. Becher*, 4 Price, 346; *Re Chertsey Market*, 6 *Id.* 279; Kerr on Injunctions, 172, 173.

⁵ Kerr on Injunctions, Chap. IX.

⁶ *Smith v. Smith*, 4 Jones Eq 303; *Thomas v. James*, 32 Alab. 723.

feme is entitled to the same protection in regard to her separate property under the Married Woman's Act.¹

A mortgagee may ordinarily pursue all his remedies at once. It sometimes, however, happens that it would be inequitable to allow him to do so, and hence he will be restrained by injunction under certain circumstances from proceeding by ejectment against the premises, or personally against the mortgagor, as the exigencies of the case may require.²

426. Another class of cases in which equity will interfere by injunction, embraces disputes between partners. It may be stated, as a general rule, that a court of chancery has jurisdiction to restrain by injunction members of a firm from doing acts inconsistent with the terms of the partnership agreement or with the duties of a partner. Injunctions may be obtained without a dissolution; or for the purpose of carrying out a dissolution; or after dissolution for the purpose of protecting the rights of the respective parties. Thus during the continuance of a partnership a man may be restrained from a breach of the partnership articles, or from excluding his copartner from the partnership business, or from entering into partnership with strangers. And perhaps the better opinion is that the court would interfere by injunction where a dissolution is not prayed, even in the case of partnerships determinable at will, although the point is somewhat doubtful.³

If a bill is filed for a dissolution of the partnership, an injunction may issue to restrain any act which may impede the winding up of the concern.

After dissolution, an agreement by a retiring partner not to carry on the business, will be enforced by means of an injunction restraining the retiring partner according to the terms of his covenant. Other stipulations may also be enforced by injunction.⁴

427. Under the general jurisdiction of courts of equity to correct abuses of confidence, injunctions will be issued to restrain

¹ Hunter's Appeal, 4 Wright, 194; Lyon's Appeal, 11 P. F. Sm. 15.

² Cockell v. Bacon, 16 Beav. 158; Booth v. Booth, 2 Atk. 343; Drummond v. Pigou, 2 Myl. & K. 168; Kerr on Injunctions, 191.

³ See upon the general subject Kerr on Injunctions, 164, 165; Lindley on Partnership, § 842; *post*, Chap. on Partnership Bills.

⁴ Kerr on Injunctions, 166, 167.

the disclosure of confidential communications, papers, and secrets. That this jurisdiction is exercised upon the ground of a breach of confidence is shown by the case of trade secrets. Ordinarily a court will not restrain a person from divulging a trade secret; but if a person has gained possession of the secret by means of a confidential relation, he will be prevented by injunction from making use of or divulging the secret, because to do so would be a breach of faith.¹

SECTION II.

INJUNCTIONS TO PROTECT LEGAL RIGHTS.

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| 428. Classification of cases in which Injunctions issue to protect legal rights. | 445. Inspection. |
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| | 464. Negative quality imported into affirmative covenants. |
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428. Having considered those cases in which a court of equity interferes by injunction for the purpose of protecting equitable

¹ *Newberry v. James*, 2 Mer. 451; *Moat*, 9 Hare, 241; 21 L. J. Ch. 248; *Williams v. Williams*, 3 *Id.* 157; *Yovatt* *Peabody v. Norfolk*, 98 Mass. 452; *Kerr v. Winyard*, 1 J. & W. 394; *Morison v. on Injunctions*, 181.

rights, it will be convenient now to pass to the second general division of the subject, viz., that which embraces the instances in which a court of equity interposes for the purpose of protecting legal rights. It would be impossible, perhaps, in a general treatise like the present to notice minutely all of these instances. Most of them, however, will be found to be embraced in some one of the following heads—viz.: Waste, Trespass, Nuisance, Copyright, Literary Property, Patent Right, Trade Marks, Alienation of Property, Protection of Property pending Litigation, Negative Covenants, and Corporations.

429. And, first, of Waste. It is settled law that a court of equity will, under proper circumstances, interfere by injunction for the purpose of restraining waste; and it will, therefore, in discussing this subject, be convenient to consider what waste is, what are its different kinds, what acts will constitute it, and for and against what parties equity will interfere.

Waste is defined to be a substantial injury to the inheritance done by one having a limited estate, either of freehold or for years, during the continuance of his estate. The essential characteristic of waste is that the party committing it is in rightful possession,¹ and that there is privity of title between the parties. Thus, for example, if a tenant by the curtesy of England were to cut down the timber on the estate, suffer the mansion house to go to decay, and tear down out-buildings, such conduct would be waste on his part, for which he would be responsible to the remainder-man, viz., the heir of the wife.

430. At common law the only parties liable for waste were the tenants of legal estates, *i. e.*, those estates which were created by act of law as distinguished from those created by act of party, and which were termed conventional estates. These parties who were thus liable for waste were tenants by the curtesy, in dower, and guardians; and, as the estates of these persons were created by law, it was thought proper that the law ought to interpose on behalf of the remainder-man, and hence these particular tenants were made liable for waste. Where, however, a limited estate was created by deed, the particular tenant was not at

¹ For injunctions to restrain injuries to property when the party is in hostile possession, see *post*, § 460.

common law liable for waste, unless it was so expressly stipulated in the conveyance; because the law would not protect parties who did not take care to protect themselves. This harsh rule was, however, altered by the statutes of Marlbridge (52 Hen. III., c. 23), and Gloucester (6 Edw. I., c. 5), and the liability for waste extended to conventional tenants for life, and to tenants for years.

The common law remedy for waste, as extended by the statutes of Marlbridge and Gloucester, was by a writ of waste, in which the thing wasted was forfeited, and damages were recovered. The writ of waste has been abolished in England, and the only common law remedy which the remainder-man now has is a special action on the case for damages.¹

In many of the United States remedies for waste are given by statute; in some of them the place wasted being forfeited, and damages recovered; in others the remedy being simply an action for damages.²

431. It is obvious that both the common law and statutory remedies were inefficient in this, viz., that they did not stop the injury that was going on, and that, however severe the remedy might be as against the defendant, it nevertheless afforded but inadequate redress to the plaintiff. Hence equity interposed by injunction to restrain the defendant from continuing to commit waste, and this remedy has been found so simple and so effective that it is now firmly established as a branch of chancery jurisdiction, and has to a great extent superseded the common law action.³

432. Anything is waste which changes the character of the inheritance. Hence even acts which increase the value of the estate may amount to waste. Such waste is called *meliorating waste*.⁴

Waste is either voluntary or permissive. Voluntary waste consists in doing something which the owner of the limited estate has no authority to do, such as cutting timber, opening mines, and so forth. Permissive waste consists in the omission of acts which it is the duty of the particular tenant to perform,

¹ *Jefferson v. Bishop of Durham*, 1 Bos. & Pull. 120; *Williams on Real Prop.* 24.

² See *Washburn on Real Prop.* 22, note.

³ See *Hill v. Bowie*, 1 Bland, 593.

⁴ *Kerr on Injunctions*, 239.

as if he permits buildings to go to decay by neglecting to repair them. For permissive waste there is generally no remedy in equity; but an injunction may issue under special circumstances.¹

It is impossible to give a catalogue of the acts which will amount to waste. It must, however, here be observed that many acts would be considered waste in England which are not so regarded in this country. Thus, in many parts of the United States, cutting timber by a tenant for life would be regarded as proper for the purpose of clearing the land;² whereas in England a tenant for life has no right to cut down trees, but can only enjoy their shade or fruit.³

It is waste to open new mines in land, although it is not waste to continue the working of mines already opened.⁴ So it is waste to cultivate land in such a manner as to change its character;⁵ to suffer a sea-wall to go to decay;⁶ to tear down buildings, or permit them to become dilapidated;⁷ or to remove fixtures.⁸ To this last species of waste, however, it must be remembered that there are important exceptions in the cases of trade fixtures, and ornamental fixtures. Trade fixtures may be removed, if taken away before the expiration of the term; and so also may fixtures for ornament in some cases, although the rule as to this last class of fixtures is much more strict than as to the former.⁹

The existence of a covenant to repair does not preclude a court of equity from restraining waste by injunction.¹⁰

¹ Kerr on Injunctions, 252; Hill on Trustees, 590 (4th Am. ed.); Powys v. Blagrove, Kay, 495.

² Crawley v. Timberlake, 2 Ired. Eq. 460; Alexander v. Fisher, 7 Alab. 514; Gardiner v. Dering, 1 Paige Ch. 573; McCullough v. Irvine, 1 Harris (Pa.), 438; Lynn's Appeal, 7 Casey, 44; Morehouse v. Cotheal, 2 Zab. 521; Keeler v. Eastman, 11 Verm. 293; Drown v. Smith, 52 Maine, 141; Williams on Real Prop. 23; Hill on Trustees, 590 (4th Am. ed.). But the tenant for life must not cut down more timber than is necessary for the enjoyment of his estate; Johnson v. Johnson, 2 Hill Ch. 277; Livingston v. Reynolds, 26 Wend. 115; Smith v. Poyas, 2 Desaus. 65.

³ He is, however, entitled to reasonable estovers for necessary repairs, agricultural implements, and firewood.

⁴ Co. Litt. 54 b.; Saunders' Case, 5 Co. Rep. 12 a.; Cowley v. Wellesley, L. R. 1 Eq. 656; Clegg v. Rowland, L. R. 2 Eq. 160.

⁵ Co. Litt. 53 b.; Kerr on Injunctions, 249.

⁶ Co. Litt. 53 b.

⁷ Co. Litt. 53 b. See Douglass v. Wiggins, 1 Johns. Ch. 435.

⁸ Kerr on Injunctions, 252.

⁹ Elwes v. Mawe, 2 Smith's Lead. Cas. 177, and notes.

¹⁰ Mayor of London v. Hedger, 18 Ves. 356.

433. An injunction to restrain waste is granted in other cases besides those of particular tenants and remainder-men. Thus, while the court will not ordinarily interfere to restrain joint-tenants, tenants in common, and co-parceners, it nevertheless will do so if the wrongdoer is insolvent, or is incapable of paying the excess of the value beyond his own share, or if the waste amounts to destructive waste or spoliation, or a partition suit has been instituted.¹

So a mortgagee in possession may be restrained from committing waste if the security is sufficient;² but if the security is insufficient he is entitled to make the most of the property.³ A mortgagor in possession is considered the owner of the property, and he may exercise all the rights of ownership. But if the security is insufficient, an injunction may go against a mortgagor.⁴

An action of waste would not lie at law by a remainder-man against the tenant for life, if there was a *mesne* remainder-man. As, for example, if there was a tenant for life, with remainder over to another for life, remainder over in fee; in such a case the last remainder-man could not maintain an action of waste against the first tenant for life, because as the effect of the action would be to forfeit the land for the benefit of the ultimate remainder-man, such a result would be extremely unjust as against the *mesne* tenant for life. The only remedy therefore which the remainder-man in fee would have, would be an action of trover for the trees cut down. But in equity, the ultimate remainder-man was allowed to maintain a bill for an injunction.⁵

Injunctions to restrain injuries to property are sometimes granted against parties claiming under a hostile title; but these are not, properly speaking, injunctions to restrain waste, but fall

¹ *Smallman v. Onions*, 3 Bro. C. C. 621; *Russell*, 24 Cal. 467; *Ensign v. Colburn*, 11 Paige, 503; *Murdock's Case*, 2 Bland, 461; *Salmon v. Clagett*, 3 Bland. 125; *Nelson v. Pinegar*, 30 Ill. 473; *Parsons v. Hughes*, 12 Maryl. 1; *High on Injunctions*, § 445 *et seq.*

² *Farrant v. Lovell*, 3 Atk. 723.

³ *Millett v. Davey*, 31 Beav. 470.

⁴ *Kerr on Injunctions*, 262; *Brady v. Waldron*, 2 Johns. Ch. 148; *Cooper v. Davis*, 15 Conn. 556; *Maryland v. Northern R. R. Co.*, 18 Maryl. 193; *Robinson v.*

⁵ See *Garth v. Sir John Hind Cotton*, 1 Ves. Sr. 546; 1 Lead. Cas. Eq. 567, 608 (3d Am. ed.).

rather under the jurisdiction to preserve property pending litigation, and will be considered under that head.

434. Besides the ordinary waste there is also another kind of the same species of injury to real property which is known by the name of equitable waste.

Waste which a court of equity will restrain as an unconscientious exercise of legal power is called equitable waste.

Equitable waste arises where a particular estate is granted without impeachment of waste, but the particular tenant exercises his power in an unconscientious manner. Thus, if a tenant for life wantonly destroys trees planted or left standing around the mansion house for ornament, such destruction will be regarded in equity as waste, although the life estate was made without impeachment of waste.¹ So also the cutting of saplings or young trees, not fit for the purpose of timber, falls under the head of equitable waste.²

The leading authorities upon the subject of equitable waste in England are *Vane v. Lord Barnard*,³ and *Garth v. Sir John Hind Cotton*.⁴ The former was a case of outrageous destruction, for Lord Barnard, who was tenant for life, without impeachment of waste, of Raby Castle, had stripped the castle of the lead, iron, glass, etc., and was proceeding to pull it down, when he was stopped by an injunction.

But the court will not interfere if the matters complained of are of a trivial nature, for, as Lord Harwicke observed in speaking of *Barnard v. Vane*, if the clause without impeachment of waste could be made use of to permit a son to call his father into a court of equity for every alteration he might make in pulling up the floor of the house, it would have been better for the public that Raby Castle should have been pulled down than that such a precedent should have been set.⁵ The ingredient of malice does not appear to be necessary to constitute equitable waste. Such waste may be committed although no bad motive may exist.⁶

¹ *Micklethwait v. Mickelthwait*, 1 De G. & J. 504.

² *Hole v. Thomas*, 7 Ves. 589.

³ *Prec. Ch.* 454; 1 Salk: 161; 2 Vern. 738.

⁴ 3 Atk. 751; 1 Lead. Cas. Eq. 697 (4th Eng. ed.).

⁵ *Peirs v. Peirs*, 1 Ves. Sr. 521.

⁶ *Kawley v. Cowes*, 2 Johns. Ch. 122.

435. The next ground for an injunction which requires consideration is Trespass.

The jurisdiction of the court of chancery to restrain destructive trespass is of comparatively modern origin. The earliest case is that of *Flamang*, decided by Lord Thurlow, and mentioned by Lord Chancellor Eldon in *Hanson v. Gardiner*.¹ "I have a note," said Lord Eldon, "of a remarkable case in which the name of one of the parties was *Flamang*. There was a demise of a close A. to a tenant for life, the lessor being landlord of an adjoining close B. The tenant dug a mine in the former close. That was waste from the privity. But when we asked an injunction against his digging in the other close, though a continuation of his working in the former close, Lord Thurlow hesitated much, but did at last grant the injunction, first, from the irreparable ruin of the property as a mine; secondly, as it was a species of trade; and thirdly, upon the principle of this court enjoining in matters of trespass, where irreparable damage is the consequence."

The jurisdiction of a court of equity to interfere upon the last of the three grounds mentioned by Lord Thurlow, is now well established, and, perhaps, more so in this country than in England.²

The cases in which the courts have interfered have been divided into two general classes: first, where the party seeking relief is not in possession; and second, where he is in possession.³ The first class of cases will more properly be considered under the jurisdiction of the court to preserve property pending litigation, because the injury inflicted upon a person who has a title to property, but who is not in possession of the same, cannot strictly be considered as a trespass. But the second class of cases, that, namely, which embraces the instances wherein a party in possession is injured by acts of trespass, falls strictly within the equitable remedy now under consideration. Thus, in the case before Lord Thurlow, just cited, the injury which was

¹ 7 Vesey, 305.

Paige, 213; 9 Wend. 571; *De Veney v.*

² See *Merced v. Fremont*, 7 Cal. 317; *Gallagher*, 5 C. E. Green, 33; *High on Anderson v. Harvey*, 10 Grat. 386; *Hart Injunctions*, Chap. X.

v. The Mayor of Albany and Brown, 3

³ *Lowndes v. Bettie*, 33 L. J. Ch. 451.

the subject of the injunction, was inflicted against a party in possession of close B.

436. Acts of destructive trespass may be again subdivided into two classes: first, those which are committed under color of title; and secondly, those which are committed by a party who is avowedly a stranger.¹ In both of these cases, in order to invoke the equitable remedy by injunction, the injury must be of such a nature as not to be susceptible of adequate pecuniary compensation in damages. Equity will not interfere to restrain a trespasser simply because he is a trespasser.² The injury complained of must be ruinous to the property in the manner in which it has been enjoyed, and such as permanently to impair its future enjoyment.³ The application of the rules upon this subject must depend very much upon the circumstances of the particular case. The insolvency of the trespasser, for example, will afford a ground for interference, since his inability to respond in damages renders the remedy at law ineffectual.⁴

So, also, in the case of *Cowper v. Baker*,⁵ the defendant was restrained from taking certain argillaceous stones, necessary to the manufacture of a patent cement, under the sea. Lord Eldon considered the damages there done to the plaintiff to be irreparable, not because it was a destruction *simpliciter*, but because it was a taking away of the substance of the inheritance. Upon the same principle, trustees of a corporation may enjoin pretended trustees from intermeddling with the corporate property where the trespass goes to the destruction of the property in the character in which it was enjoyed.⁶ The general principles

¹ *Lowndes v. Bettie*, 33 L. J. Ch. 451. *Hicks v. Compton*, 18 Cal. 206. See

² *Stevens v. Beekman*, 1 Johns. Ch. 318; *Mulvany v. Kennedy*, 2 Casey, 44; *Weigel v. Walsh*, 45 Missouri, 560; *Bethune v. Wilkins*, 8 Geo. 118; *Van Winkle v. Curtis*, 2 Green Ch. 422; *Shipley v. Ritter*, 7 Maryl. 408; *Coker v. Simpson*, 7 Cal. 340; *West v. Walker*, 2 Green Ch. 279; *Gause v. Perkins*, 3 Jon. Eq. 177.

³ *Echelkamp v. Schrader*, 45 Missouri, 505; *Mayor of Frederick v. Groshon*, 30 Maryl. 436.

⁴ *Musselman v. Marquis*, 1 Bush, 463;

Gause v. Perkins, 3 Jon. Eq. 177.

⁵ 17 Ves. 128. See, also, *Merced v. Fremont*, 7 Cal. 317; *Anderson v. Harvey*, 10 Grat. 386; *United States v. Gear*, 3 Howard, 120; *Davis v. Reed*, 14 Maryl. 152.

⁶ *Trustees v. Hoessli*, 13 Wis. 348. The decision in this case was put upon the ground of destructive trespass, but it would seem that it might have been sustained under the general jurisdiction of chancery to protect charities and enforce religious trusts.

which govern cases of this kind were well laid down by Vice Chancellor Kindersly in the case of *Lowndes v. Bettle*.¹ "Where, therefore," says that learned judge, "the plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under color of right, the tendency of the court is not to grant an injunction, unless there are special circumstances,* but to leave the plaintiff to his remedy at law, though, where the acts tend to the destruction of the estate, the court will grant it. But where the party in possession seeks to restrain one who claims by adverse title, then the tendency will be to grant the injunction, at least where the acts done either did or might tend to the destruction of the estate."

437. Under the head of injunction to restrain destructive trespass may, perhaps, fall many of the cases in which public companies are restrained from an improper exercise of their statutory rights to take private property for their own use; although some of the cases of this description may more properly be classed under "Injunctions against Corporations."

In cases of trespass by corporations, courts of equity will act with greater promptness, and will apply more stringent rules than in the case of trespass by private individuals. There is an equity to keep corporations within the strict limits of their statutory powers, and prevent them from deviating in the smallest degree from the terms prescribed by the statute which gives them authority. A man has a right to say that a corporation shall not enter upon his land, except upon the terms, and under the regulations prescribed by statute; and he has a further right to invoke the aid of a court of equity to protect him by its writ of injunction.²

438. Another injury to real property, to redress which it has been found necessary to resort to the equitable remedy of injunction, is Nuisance; and the authority of the court is, in modern times, probably as frequently applied, and as beneficially exercised, in this as in any other branch of equity jurisprudence.

¹ 33 L. J. Ch. 461.

Frewin v. Lewis, 4 Myl. & Cr. 249; *Tin-*

² See *Kemp v. London and Brighton Railway Co.*, 1 Railw. Cas. 495; *Bell v. Hull and Selby Railway Co.*, *Id.* 635; *kler v. The Metropolitan Board of Works*, 2 De G. & J. 261; *Kerr on Injunctions*, 296.

A nuisance is an act, unaccompanied by an act of trespass, which causes a substantial injury to the corporeal or incorporeal hereditaments of other persons. Where a man wrongfully disturbs another in the exclusive enjoyment of property, he commits an act of trespass; but where the infringement of the right is the consequence of an act which is not, in itself, an invasion of property, the cause from which an injury flows is termed a nuisance.¹

Nuisances are either public or private. A private nuisance is an injury to the property of an individual. A public nuisance is an injury to all persons who come within the sphere of its operation.²

439. The remedy for public nuisance is by information by the attorney general. But if the individual has also sustained special damage over and above the public injury, he may also proceed by bill.

The remedies at common law for a private nuisance were, an action on the case to recover damages, the assize of nuisance, which lay originally only against the wrongdoer, but was subsequently extended as against the alienee, by the statute of Westminster the Second; and the writ *quod permittat prosternere*, which lay against the alienee as well as the wrongdoer, and was in the nature of a writ of right. These last two remedies fell out of use in England, and were finally abolished by statute 3 & 4 Wil. IV., c. 27; so that the only remedy now in use in the common law courts is the action on the case for damages.

It is obvious that this remedy is very insufficient. If one man is carrying on a trade near another's house, which is injurious to the health of the latter, and destructive to his property, a recovery of damages is manifestly but a poor redress. Hence equity will interfere by injunction to restrain the continuance of the noxious trade, and thus effectually put a stop to the injury. This jurisdiction in cases of nuisance is of an ancient date, and has been traced back to the reign of Elizabeth,³ since

¹ Kerr on Injunctions, 332.

² See *Soltau v. De Held*, 2 Sim. N. S. 142.

³ "The bill was to be relieved of a nuisance committed by the defendant to

the plaintiff's mill, by erecting a new mill and turning or letting the watercourse from serving the plaintiff's mill; but for that the plaintiff, since the bill exhibited had brought an assize of nuisance at law.

which time it has been continuously exercised ; and the modern doctrine may be stated in general terms to be that equity has concurrent jurisdiction with courts of law in all cases of private nuisance, the interference of chancery in any particular case being justified on the ground of restraining irreparable mischief, or of suppressing interminable litigation, or of preventing multiplicity of suits.¹

In modern times (as has been already stated) the jurisdiction of courts of chancery in cases of nuisance has been very beneficially and very frequently exercised, and the whole doctrine of equity upon this subject has been most thoroughly and carefully considered both in England and in this country. Perhaps no better way of explaining the principles upon which courts of equity act in cases of this kind can be found than by stating briefly one or two of the leading authorities upon the subject, and the conclusions which have been reached therein.

In *Tipping v. St. Helen's Smelting Company*,² certain persons had purchased a portion of an estate for the purpose of erecting thereon works for smelting copper, and the defendant subsequently purchased another portion of the same estate with notice of the erection and operation of the smelting works. After this, the company defendants were organized for the purpose of carrying on the copper works on a larger scale ; and the plaintiff, having discovered that injury had already been done to his trees, brought an action at common law for damages, and after obtaining a verdict and judgment (which was affirmed in the House of Lords), filed a bill in equity for an injunction, which was granted.

In this case (when in the House of Lords) the distinction was taken between nuisances which produce a material injury to property, and those things which are alleged to be nuisances simply on the ground that they are productive of personal inconvenience. In the latter class of cases a person has no right to complain of individual discomfort from business in the

Therefore the cause is dismissed, if cause be not showed. Osburne plaintiff, Barter and Goddins, defendants. Anno 26 Eliz." Choyce Cases in Chancery, p. 176 (Reprint of 1870).

¹ *Carlisle v. Cooper*, 6 C. E. Green, 576.

² 11 H. L. Cas. 642; L. R. 1 Ch. App.

neighborhood, if that business is carried on in a fair and reasonable way, but, on the other hand, this rule would not apply to circumstances the immediate result of which is a sensible injury to the value of property. And it was further said that while everything must be looked at from a reasonable point of view, and the law does not regard trifling and small inconveniences, but only those which sensibly diminish the comfort, enjoyment, or value of the property which is affected; yet the fact of injury having been found by a jury, their verdict would not be disturbed; and that consequently the plaintiff was entitled, in the chancery suit, to an injunction to protect his rights which had been thus ascertained at law.

On the other hand, when the alleged nuisance consists in something which produces purely personal annoyance without injury to the property, the question is emphatically one of degree. Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable. Therefore, in *Gaunt v. Fynney*,¹ where trifling annoyance had been occasioned by the noise and vibration from a silk mill, which had been acquiesced in for some time, the court refused the injunction. Where, however, business which is carried on is physically offensive to the senses, and, therefore, by producing physical discomfort, renders houses in the neighborhood unfit for residences, it will be a nuisance; and not the less so because there may be persons whose habits of life have brought them to endure the same annoyance without discomfort.²

The same principles as those laid down in these cases have been generally recognized and applied in the courts throughout the United States,³ and in other decisions in England.⁴

¹ L. R. 8 Ch. App. 8.

² *Cleveland v. Citizens' Gas Light Co.*, 5 C. E. Green, 201.

³ *Rhodes v. Dunbar*, 7 P. F. Smith, 274; *Richards's Appeal*, *Id.* 105; *Cleveland v. Citizens' Gas Light Co.*, 5 C. E. Green, 201; *Carlisle v. Cooper*, 6 *Id.* 576; *Ross v. Butler*, 4 *Id.* 294; *Webber v. Gage*, 39 N. Hamp. 182; *Parker v. Winnipiseogee Co.*, 2 Black (U. S.), 545.

⁴ *Walter v. Selfe*, 4 De G. & Sm. 315; *Crump v. Lambert*, L. R. 3 Eq. 409; *Soltan v. De Held*, 2 Sim. (N. S.) 133; *Bostock v. North Stafford R. R. Co.*, 5 De G. & Sm. 584; *Wood v. Sutcliffe*, 2 Sim. (N. S.) 163; *Hole v. Barlow*, 4 C. B. (N. S.) 334; *Crossley v. Lightowler*, L. R. 2 Ch. App. 478; *Att. Gen. v. Bradford Canal*, L. R. 2 Eq. 71; *Robson v. Whittingham*, L. R. 1 Ch. App. 442.

440. The right to an injunction to restrain a nuisance depends very often upon a preliminary question as to the plaintiff's legal right, that is to say, whether his legal right has been admitted or established. To illustrate: suppose a bill is filed to restrain a defendant from erecting a wall whereby the alleged ancient lights of the complainant would be darkened. Now the question of nuisance or no nuisance in this case would obviously depend upon the ascertainment of a preliminary fact—viz., whether the complainant actually had a right to his windows as ancient lights, because, if he fails to show this, or fails to show that by some other means, *e. g.* a grant of an easement, he has acquired the right to unobstructed windows, the act of the defendant is obviously no nuisance.¹

Now if the complainant's legal right is admitted, or if it be clearly established, then his right to an injunction is plain.² But if it is manifest that the complainant has no legal right, the injunction must be refused.

If the case falls between these two—that is to say, if the complainant's title is doubtful, the ordinary rule is not to interfere until his title has been established at law.³ Where, however, the emergency is pressing, and the threatened damage would be irreparable, and the plaintiff makes out a far *primâ facie* title, even though that title may be disputed, in such a case a special injunction ought to issue, but, at the same time, the complainant ought to take diligent steps to have his legal right tried and established.⁴

Again : a court of equity will not interfere if the damage is slight, and the nuisance is of a temporary character, so that

¹ Biddle v. Ash, 2 Ashmead, 211; Rhea v. Forsyth, 1 Wright (Pa.), 507. See, also, White v. Booth, 7 Verm. 131; Varney v. Pope, 60 Maine, 192; Coe v. The Winnepiseogee Co., 37 N. Hamp. 254; Eastman v. Amoskeag Co., 47 Id. 71; Hart v. The Mayor of Albany, 3 Paige Ch. 213; Reid v. Gifford, 6 Johns. Ch. 19; Frizzle v. Patrick, 6 Jones Eq. 354; Caldwell v. Knott, 10 Yerg. 209; Arnold v. Klepper, 24 Missouri, 273; McCord v. Iker, 12 Ohio, 387; Durant v. Williamson, 3 Halst. Ch. 547; Carlisle v. Cooper, 6 C. E. Green, 576; High on Injunctions, § 486.

² See Gas Co. v. Broadbent, 7 H. L. Cas. 600; Denton v. Leddell, 8 C. E. Green, 64.

³ See authorities cited in note 1.

⁴ See Holsman v. Boiling Spring Co., 1 McCart. 335; Duncan v. Hayes, 7 C. E. Green, 25; Carlisle v. Cooper, 6 Id. 576; Gardner v. Newbury, 2 Johns. Ch. 162; Soltan v. De Held, 2 Sim. N. S. 133; Kerr on Injunctions, 197, 336, 340.

damages at law would furnish an entire and adequate reparation.¹

The nuisance, moreover, must actually exist, or be imminent. A mere threat, or an act which may upon some contingency or at some remote time prove a nuisance, will not warrant the interference of the court.² And the injury must not be contingent merely; and apprehension on the part of the complainant of a possible or speculative harm will not be enough.³ A bill to enjoin a nuisance is usually brought by the occupier, or by the lessee in possession, but the owner may sue on the ground of injury to his property, either alone or conjointly with the occupier.⁴

441. The different kinds of nuisances are of course numerous and varied; and whether or not a court of equity will interfere will depend very much upon the circumstances of the particular case.

It is a nuisance, as has been already stated, to obstruct the light and air to which the owner of a building is legally entitled;⁵ but it is not a nuisance, simply to shut out a pleasant prospect or to erect disagreeable objects in view, or to open windows whereby a man's private grounds may be overlooked.⁶

The enjoyment of pure and wholesome air is a right to which the occupiers of land are entitled as of common right; and any act which pollutes and corrupts the air so as to produce a real and sensible damage constitutes a nuisance.⁷ It would be impossible in a work like the present to give a catalogue of all the

¹ *Webber v. Gage*, 39 N. Hamp. 186; *Bemis v. Upham*, 13 Pick. 169; *Croton Turnpike v. Ryder*, 1 Johns. Ch. 611; *Richard's Appeal*, 7 P. F. Sm. 105; *Wingfield v. Crenshaw*, 4 Hen. & Munf. 474; *Bradsher v. Lea*, 8 Ired Eq. 301; *Thebaut v. Canera*, 11 Florida, 143.

² *Kerr on Injunctions*, 337, 338.

³ *Rhodes v. Dunbar*, 7 P. F. Sm. 274; *Butler v. Rogers*, 1 Stockt. 487; *Mohawk Bridge Co. v. Utica and Schuectady R. Co.*, 6 Paige Ch. 554.

⁴ *Kerr on Injunctions*, 336.

⁵ *Johnson v. Wyatt*, 2 De G. J. & S.

18, 26; *Robson v. Whittingham*, L. R. 1 Ch. App. 442; *Staight v. Burn*, 5 *Id.* 163; *Biddle v. Ash*, 2 Ashmead, 211. The English rule upon the subject of ancient lights has not been generally followed in this country; *King v. Miller*, 4 Halst. Ch. 559; *Chevry v. Stein*, 11 Maryl. 1; *High on Injunctions*, § 553.

⁶ *Aldred's Case*, 9 Coke, 58 a.; *Webb v. Bird*, 10 C. B. (N. S.) 276; *Att. Gen. v. Doughty*, 2 Ves. 453; *Jones v. Tapping*, 12 C. B. (N. S.) 842, per Blackburn, J.

⁷ *Kerr on Injunctions*, 360.

acts which have been held to be nuisances under this rule. A few of them are given, by way of illustration, in the note.¹

Noisy manufactories may be nuisances; and mere noise, from whatever cause, will, on a proper case being made out, be a sufficient ground for an injunction.² But the jurisdiction in such cases should be exercised with great caution. Lord Chancellor Selborne, in *Grant v. Fynney*,³ quoted with approval the old Scotch maxim which forbids a man to use his own rights "*in emulationem vicini*;" and said that neighbors everywhere (and certainly in manufacturing towns) ought not to be extreme or unreasonable either in the exercise of their own rights or in the restriction of the rights of each other. A dangerous business, such as the manufacture of gunpowder or the storage of highly combustible goods, may be a nuisance.⁴

442. It was formerly thought that if a man erected a dwelling house in the immediate neighborhood of a factory where an offensive, or noisy, or dangerous trade was carried on, he was not entitled to his injunction, because it was his own fault to move into proximity to the objectionable trade.⁵ But this doctrine of "coming to nuisance" (as it was termed) is now exploded, and the most recent authorities hold that the injunction will not be refused on that ground.⁶

443. Acts whereby the right of vertical and lateral support to one's land, by the subjacent and adjacent soil, is interfered with; whereby rights in the enjoyment of water are affected; or

¹ Brick-burning, *Walter v. Selfe*, 4 De G. & S. 325; (though see *Huckenstine's Appeal*, 20 P. F. Sm. 102); offensive smoke, *Crump v. Lambert*, L. R. 3 Eq. 409; offensive gases, *Tipping v. St. Helen's Smelting Co.*, L. R. 1 Ch. App. 66; a soap-boilery, *Regina v. Pierce*, Show. 327; a slaughter-house, *Regina v. Cross*, 2 Car. & P. 484; *Bishop v. Banks*, 83 Conn. 118; a hog-sty, *Aldred's Case*, 9 Co. Rep. 58 b. See *Rhodes v. Dunbar*, 7 P. F. Smith, 275 (per Read J.).

² *White v. Cohen*, 1 Drew. 313; *Soltan v. DeHeld*, 2 Sim. N. S. 133; *Crump v. Lambert*, L. R. 3 Eq. 409.

³ L. R. 8 Ch. App. 11. See, also, the

remarks of Lord Westbury in *Tipping v. St. Helen's Smelting Co.*, 11 H. L. Cas. 484; *Huckenstine's Appeal*, 20 P. F. Sm. 107; *Sparhawk v. Union Passenger Railroad*, 4 P. F. Sm. 401.

⁴ *Crowder v. Tinkler*, 19 Ves. 617; *Hepburn v. Lordan*, 2 Hem. & M. 345; *Weir v. Kirk*, 30 Leg. Int. 405.

⁵ See 2 Black. Com. 402; *Kerr on Injunctions*, 363.

⁶ *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Tipping v. St. Helen's Smelting Co.*, L. R. 1 Ch. App. 66; 11 H. L. Cas. 484. See *Cleveland v. Citizens' Gas Light Company*, 5 C. E. Green, 201.

whereby rights of way are impeded, are all nuisances, and will be enjoined on a proper case being made out.¹

Equity entertains jurisdiction by injunction in cases of purpresture. A purpresture originally signified a close or inclosure; that is, where one encroaches, or makes that several to himself, which ought to be common to many.² In its common acceptation it afterwards came to mean an encroachment upon the king, either upon part of his demesne lands, or upon rights and easements held by him for the public, such as upon highways, public rivers, forts, streets, squares, bridges, quays, and other public accommodations; and the tendency now is, perhaps, to restrict its signification to an invasion or an encroachment on the soil of the seashore, or bed of an estuary or navigable tidal river between high and low-water mark while the same remains in the crown. To constitute a public nuisance it should be shown that the purpresture is productive of damage to some public right. If the act complained of be a mere purpresture without being at the same time a nuisance, the court will usually direct an inquiry to be made whether it is more beneficial to the crown to abate the purpresture, or to suffer the erection to remain and be arrested. But if the purpresture be also a public nuisance, this cannot be done, for the Crown cannot sanction a public nuisance.³

A bill in equity to abate a public nuisance filed by one who has sustained special damage, has succeeded to the former mode in England of an information in chancery, prosecuted on behalf of the crown, to abate or enjoin the nuisance, as a preventive remedy, and the jurisdiction of courts of chancery in such cases is well established in this country.⁴ Unless the party who files the bill can show that he has sustained, and is still sustaining, individual damage, his bill cannot be maintained.⁵ If the injury suffered is one which has been sustained in common with other

¹ Kerr on Injunctions, 366 *et seq.*; High on Injunctions, 279 *et seq.*

² Co. Litt. 38, 272; Story's Eq. Jurisp., § 921.

³ Kerr on Injunctions, 395, 396.

⁴ State of Pennsylvania v. The Wheeling Bridge Co., 13 How. 564.

⁵ Mississippi and Missouri R. R. Co. v. Ward, 2 Black (U. S.), 492; Hinchman v. Paterson Horse R. R. Co., 2 C. E. Green, 75.

citizens, and the damage is not special or peculiar, the injunction will be dissolved.¹

Companies having the power to take land and construct public works, are not amenable to the jurisdiction of a court of equity if they keep within the line of their powers, and proceed under their authority with due skill and care. But if they exceed their authority, or if they construct their works in such a negligent and unskilful manner as to cause injury to others, the court will interfere.²

Where public rights under the laws of the United States are infringed, the circumstance that the act was done by virtue of authority from a State legislature, is no justification.³

444. The jurisdiction of equity upon the subjects of patent-right, copyright, literary property, and trade-marks, depends upon the fact that the remedy at common law is entirely inadequate. Thus an infringement of a patent cannot be redressed by damages at law, for two reasons: in the first place, it may be very difficult, if not altogether impossible, to ascertain the exact amount of injury which the unlawful use or manufacture of the patented article may have occasioned; and, in the second place, every fresh violation of the plaintiff's right would call for a new action, and thus the injured party would be involved in constantly renewed and, perhaps, interminable litigation. For these reasons the equitable remedy by injunction has been employed, in order that the right of the plaintiff, if it really exists, may be settled at once and forever, and the wrongful acts of the defendant may be permanently stopped.

The equitable remedy possesses an advantage over the common law action in obtaining three results which cannot be reached by a suit for damages, viz., (1) Inspection; (2) Injunction; and (3) Account.

445. The first of these advantages is most frequently shown

¹ *Allen v. Board of Freeholders*, 2 Beas. 91; *Bunnell's Appeal*, 19 P. F. Sm. 59; 68. See upon the general subject *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *Corning v. Lowerre*, 6 Johns. Ch. 439; *Hartshorn v. South Reading*, 3 Allen, 501; *Delaware and Maryland R. Co. v. Stump*, 8 Gill & J. 479; *Buck Mt. Co. v. Lehigh Co.*, 14 Wright (Pa.), 506; *High on Injunctions*, § 822 *et seq.*

² *Kerr on Injunctions*, 842; *post*, Injunctions in cases of Corporations.

³ *State of Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518.

in cases of bills to restrain violations of patent rights. It sometimes happens that a patentee is unable to ascertain how, or in what particulars, the machinery used by his rival is a violation of his right. In such cases a court of equity will, upon a fair *prima facie* case being made out, order the defendant to permit an inspection to be made of his premises and machinery by proper persons named on behalf of the plaintiff.¹

446. In the second place, the equitable remedy by special injunction is efficacious in restraining at once the violation of the complainant's rights, if a proper case for such relief is made out on preliminary application; while, after the right of the complainant and the fact of infringement have been duly established, the perpetual injunction forever prevents infringements in the future.

447. Thirdly; for the purpose of affording complete relief equity will order an account by the defendant of all the profits which he has made, and will compel him to make discovery for the purpose of ascertaining such profits. In taking the account the court is ordinarily confined to the profits actually made. Thus the court cannot estimate how many copies of an expensive book have been excluded from the market by the unauthorized publication of a cheaper copy.² In cases of patents, however, the courts of equity in England are authorized by statute to inquire into the question of damages in addition to, or in substitution for an account.³ And in cases of infringement of rights of literary property—*e. g.*, a dramatic composition—an inquiry has been directed to ascertain how much a license to represent the play would have been worth.⁴

In coming to obtain relief in equity the complainant must exercise due diligence. If he has been guilty of great delay, or of acquiescence in the infringement of his rights, relief will be refused.

448. Having noticed the general principles applicable to the cases now under consideration, it will be convenient to say a few words about each of these cases in detail.

¹ Davenport v. Jepson, 1 N. R. 308;
Kerr on Injunctions, 433.

² Stat. 21 & 22 Vic., c. 27.

³ Keane v. Wheatley, 9 Am. Law Reg.

⁴ Colburn v. Simms, 2 Hare, 543; Kerr
on Injunctions, 472.

And, first, as to patent rights. A patent is a grant by government, to the author of a new and useful invention, of the exclusive right for a term of years of practising that invention. The right is dependent upon statute; and, in the United States, rests upon acts of congress, the subject being one which, under the Constitution, falls within the sphere of federal jurisdiction. The right to interfere by injunction, therefore, in this class of cases, is exercised only by the courts of the United States, the State courts having no jurisdiction.¹

What constitutes the proper subject matter of a patent; what parties are entitled to it; what steps are necessary to obtain it; and what acts would amount to an infringement thereof, are, of course, questions which do not fall within the scope of this work. They will be found learnedly discussed in separate treatises.² It will be sufficient, in addition to the general principles already stated, to notice a few rules by which the application of the equitable remedy of injunction to this subject is regulated.

449. In England, it had once been the opinion that a court of equity would not interfere to protect a patent right by injunction, until the right had been established at law;³ but this doctrine was denied by Lord Eldon, and it is now settled that the court will interfere in all cases where there is a clear color of title, and assertion of right has not been disputed.⁴ The federal courts have followed the doctrine of Lord Eldon, and have been disposed to extend its application with considerable liberality; so that it is now by no means necessary, as a general rule, that there should be a trial at law whereby the validity of the complainant's title may be established before an injunction goes out, even (it would seem) in the case of a final injunction.⁵ The question, however, must be one as to the decision of which the court is to exercise a sound discretion.⁶ If the patent be an

¹ *Parkhurst v. Kinsman*, 2 Halst. Ch. 167; *Potter v. Muller*, *Id.* 465; *Shelly v. Brannan*, 4 *Id.* 198.

² See *Curtis on Patents*.

³ *Millar v. Taylor*, 4 Burr. 2303.

⁴ *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 689.

⁵ *Sickles v. Gloucester Manufacturing Co.*, 1 Fish. 222; *Sanders v. Logan*, 2 *Id.*

⁶ *Brooks v. Norcross*, 2 Fish. 661; *Potter v. Fuller*, *Id.* 251; *Motte v. Bennett*, *Id.* 642. See this last case, also,

for a discussion of the general subject of equity jurisdiction in cases of Patents. See *High on Injunctions*, § 604.

old one, that is a strong circumstance in favor of letting the injunction go out. If it be but of yesterday, the remedy is to be applied with more caution, and stronger *primâ facie* proof of title and infringement will be required. Many other circumstances may exist whereon the propriety of issuing the injunction may depend. Thus the defendant's *bona fides* in acting under letters patent of his own; the hardship of the particular case; the defendant's solvency; and the diligence of the complainant, should all be considered.¹

In this country, contrary to the English rule, an account may be granted although the injunction is refused.² Thus, if the patent has expired between the time of filing the bill and the hearing, an account may be directed, though no injunction will be allowed against the future use of the article.³

450. Copyright, according to the legal acceptation of the term, is the exclusive right or monopoly of multiplying a work of literature or art after it has been published; the right, in other words, of preventing all others from copying, by printing or otherwise, a work of literature or art which the author has published.⁴ It is interesting to know that the question whether there was or was not a copyright at common law after publication, was for a long time involved in doubt.⁵ The prevailing opinion at first was that such a right did exist, and this right was recognized in many decisions, and by many judges, among them by no less eminent jurists than Lords Mansfield and Hardwicke, the latter of whom in 1739 restrained by injunction the publication of Milton's *Paradise Lost*, although the title of the plaintiff was derived from an assignment by the author made in 1667. But this did not long continue to be the law. The House of Lords, in *Donaldson v. Beckett*, in 1774, distinctly overruled the previous decisions; and it must now be considered settled that there is no copyright at common law after publication.⁶

451. Copyright in this country depends upon the Acts of

¹ High on Injunctions, § 616 *et seq.*

² Sickles v. Gloucester, 1 Fish. 222; Imlay v. Norwich, etc., R. R. Co., 4 Blatch. 227.

³ Imlay v. Norwich *ut sup.*; High on Injunctions, § 623.

⁴ See Kerr on Injunctions, 445; Stephens v. Cady, 14 Howard, 530.

⁵ Shortt on the Law of Literature and Art, 61 *et seq.*

⁶ 4 Burr. 2408, 2 Bro. P. C. 129.

Congress; and the remedies for its infringement are exclusively within the United States courts.¹ In order to invoke the equitable remedy by injunction, it is not, as a general rule, necessary in this country to establish the right at law in the first instance. The title of the complainant, and the fact of the infringement, may be established in the suit for an injunction. The subject, however, is one for the discretion of the court, and a trial at law may be required as a prerequisite to the injunction, if the court should think proper.

It would not be within the scope of this work to describe in detail what are the subjects of copyright, and what will constitute an infringement of the right.

In this country the subjects of copyright are enumerated by Section 86 of the Act of Congress of 1870, which was passed for the purpose of amending, revising, and consolidating the statutes upon the subject. By that section the benefit of the Act is extended to "any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, or any painting, drawing, chromos, statue, statuary, models or designs intended to be perfected as works of the fine arts;" and authors are empowered to reserve the right to dramatize or to translate their own works.

452. Piracy of a copyright is the unauthorized substantial appropriation of the labors of the original author.² *Bonâ fide* extracts, and quotations from a book, are not infringements of a copyright, nor is a *bonâ fide* abridgment. It is scarcely possible, however, to lay down any general rule upon this subject, as the question is one of degree rather than of kind, and the decision must, in most instances, depend upon the particular circumstances of the case under consideration. A few of the leading authorities upon this subject will be found in the note.³

It is no objection to an injunction that it will stop the sale of the work by which the copyright is infringed. If a man chooses to make an unlawful appropriation of another's work to

¹ *Dudley v. Mayhew*, 3 Comst. 9; *High on Injunctions*, § 641.

² *Shortt on the Law of Literature and Art*, 248.

³ *Folsom v. Marsh*, 2 Story, 100;

Blunt v. Patten, 2 Paine, 397; *Gray v. Russell*, 1 Story 11; *Story's Exrs. v. Holcombe*, 4 McLean, 306; *Stowe v. Thomas*, 2 Am. Law. Reg. 210.

such an extent that the original portions of his own book cannot be separated from the parts which have been improperly appropriated, he must pay the penalty for so doing.¹

To constitute a piracy there must be a multiplication of copies of the original work. Any other use of it, such as for the purpose of public readings or recitations, will not be a piracy;² but any multiplication of copies, even though such new copies are not designed for sale, will be an infringement.³

453. There can be no copyright of works which are manifestly irreligious, immoral, and obscene; and a court of equity will not interfere by injunction to protect such works. This rule, however, is one which requires to be applied with extreme caution and delicacy; for it is not unfrequently the case that what to one man would appear to be highly irreligious, would to another seem but a fair and candid investigation or criticism.⁴

It may be added that the jurisdiction of equity is exercised solely on the ground of protection to property; and that there is no jurisdiction to restrain the publication of improper or libellous works, merely on account of their mischievous character. Moreover, for a libel there is a complete remedy at law.⁵

454. While it is true (as it has been already stated), that after publication there can be no property in a literary production, yet before publication the rule is different, and the right to such property is exclusively in the producer, and any infringement of that right will be restrained by an injunction. It has been quaintly observed that the ideas of an author are like "birds in a cage, which none but he can have a right to let fly, for till he thinks proper to emancipate them they are under his own dominion."⁶

The leading case on this subject is that of *Prince Albert v.*

¹ *Jarrold v. Houlston*, 3 K. & J. 708; *Emerson v. Davies*, 3 Story, 768.

² *Reade v. Conquest*, 9 C. B. (N. S.) 755; *Tinsley v. Lacy*, 1 Hem. & M. 747.

³ *Novello v. Sudlow*, 12 C. B. 177.

⁴ *High on Injunctions*, § 642; *Story's Eq. Jurisp.*, § 936.

⁵ *Brandreth v. Lance*, 8 Paige, 24.

Where the libel consists in the publication of something that is likely to injure the mercantile credit of the complainant, an injunction will issue. *Dixon v. Holden*, L. R. 7 Eq. 488.

⁶ *Millar v. Taylor*, 4 Burr. 2378; *Shortt on the Law of Literary Property*, 49.

Strange,¹ where Queen Victoria and her husband, for their own amusement, had made some etchings, and afterwards had lithographic impressions thereof struck off by means of a private press. Some copies having surreptitiously come into the hands of a workman, they were finally sold to Strange, a publisher, who appears to have been a *bond fide* purchaser. He prepared and printed a descriptive catalogue in which he announced the forthcoming publication of copies of the etchings. Upon a bill filed, not only was the publication of the etchings enjoined, but the catalogue also was declared to be a violation of the private right of property in the etchings.

This case, while it is a striking one, is by no means, however, the earliest decision upon the subject, as the right of property in unpublished literary productions and the consequent right to the protection of a court of equity had been recognized long before.²

455. The questions which have most frequently arisen upon this subject are as to publication. If there has been a publication, the right is, of course, gone. But whether there has or has not been a publication is often a difficult question. The representation of a play at a theatre is not such a publication as will deprive the author of his common law right.³ And the publication of lectures was restrained before the passage of the Act of Parliament for their protection, on the ground of a breach of confidence.⁴

Equity will also restrain the publication of letters; for while the person who receives letters has a right to the possession thereof, he has only a property for a special purpose, and not for the purpose of publication.⁵ Under certain circumstances, however, the recipient of letters *may* have a right to publish them; *e. g.*, where it is necessary to vindicate his character, or for the purposes of justice.⁶ The writer of letters has a right to publish them; and this right cannot be controlled by the receiver.⁷

¹ 1 MacN. & G. 42.

⁴ *Abernethy v. Hutchinson*, 3 L. J. Ch.

² In 1732. See Shortt on the Law of Literary Property, 54.

⁵ *Pope v. Curl*, 2 Atk. 342. See *Hopkinson v. Burghley*, L. R. 2 Ch. App. 447.

³ *Palmer v. De Witt*, 2 Sweeney, 530. See, also, *Keene v. Wheatley*, 9 Am. Law. Reg. 33, where the whole subject is examined at length by Mr. Justice Cadwalader.

⁶ *Percival v. Phipps*, 2 V. & B. 25; *Gee v. Pritchard*, 2 Swanst. 428; *Folsom v. Marsh*, 2 Story, 100.

⁷ *Kerr on Injunctions*, 186, 187.

It may also be stated, that on general principles of equity, the publication of any manuscript will be restrained, when such publication would involve a breach of confidence or other violation of duty.¹

456. The jurisdiction of equity to restrain the infringement of trade-marks, is exercised for the protection of a legal right in property. Every man who manufactures or sells goods has the right to distinguish them from similar goods sold or manufactured by another; and for this purpose he has the further privilege of using some particular mark or symbol. This mark or symbol is known as a trade-mark, and it is used for the purpose of denoting that the article to which it is affixed is sold or manufactured by the party using the mark or by his authority, or that he carries on his business at a particular place.

It is an invasion of the right above stated for one man to sell his goods as those of another; and when this invasion is effected by means of counterfeiting or imitating a trade-mark or by making use of another trade-mark which is calculated to deceive the public into a belief that the spurious symbol is the original, such an invasion is an infringement of the property in the trade-mark, and will be restrained by a court of equity by its writ of injunction.²

The right of property in trade-marks was recognized in the common law courts at an early date,³ but a long period elapsed before such right was protected by injunction in a court of equity.⁴ During the past thirty years, however, the jurisdiction of chancery in such cases has become thoroughly established, and has been frequently exercised; and very many authorities exist on both sides of the Atlantic wherein this species of property has been protected by writs of injunction.⁵ The legislative authority

¹ See *Stapleton v. Foreign Vineyard Ass'n*, 12 Weekly Rep. 976; *Scheile v. Brakell*, 11 *Id.* 796; *Joyce on Injunctions*, 350. *Dixon Crucible Co. v. Guggenheim*, 2 Brewster, 326, for a discussion of the history of the law upon this subject.

² See *Bradley v. Norton*, 33 Conn. 157; *Leather Cloth Co. v. American Cloth Co.*, 11 H. L. Cas. 523. ⁵ See *Knott v. Morgan*, 2 Keen, 213; *Gout v. Alepoglu*, 6 Beav. 69; *Perry v. Truefitt*, *Id.* 66; *Croft v. Day*, 7 Beav. 84; *Farina v. Silverlock*, 6 De G. M. & G. 214; *Glenny v. Smith*, 2 Dr. & Sm. 476; *Edelsten v. Edelsten*, 1 De G. J. & Sm. 185; *Seixo v. Provezende*, L. R. 1 Ch.

³ *Southern v. How*, Popham, 143. See *Browne on Trade-Marks*, chap. i.

⁴ *Blanchard v. Hill*, 2 Atk. 484. See

has also stepped in to the aid of the judicial, and by the Act of Congress of 1870, persons entitled to use any trade-mark, or who intend to adopt any for exclusive use, are entitled to protection for thirty years with a privilege of renewal, under certain restrictions, and upon compliance with the regulations prescribed by the Act.¹

Indeed the law upon this subject now occupies a large space in modern works on injunctions, and has grown into a system sufficiently extensive to call for a separate treatise;² and while an elaborate discussion of the authorities would undoubtedly be out of place in a work like the present, it will, nevertheless, be proper to refer very briefly to one or two of the decisions, and the general principles which have been established.

In the *Leather Cloth Co. v. The American Leather Cloth Co.*,³ the complainants sought to obtain an injunction restraining an alleged infringement of their trade-mark, which consisted of a certain device (the American Eagle) surrounded by words purporting to be a description of the goods.

This description was false in certain particulars. The defendants made use of a trade-mark somewhat resembling that of the complainants, but not enough to deceive a purchaser using ordinary caution. Upon a bill being filed to restrain the use of the defendants' trade-mark as an infringement upon that of the plaintiffs, it was held by Lord Chancellor Westbury⁴ that the complainants were not entitled to relief, because they themselves had been guilty of a false assertion calculated to deceive the public; and by the House of Lords, affirming his decision, that the difference between the two trade-marks was such that no infringement could be said to exist. This case therefore may be considered as establishing two propositions: first, that the trade-

App. 192; *Ainsworth v. Walmsley*, L. R. 1 Eq. 518; *Braham v. Bustard*, 1 Hem. & M. 447; *Cocks v. Chandler*, L. R. 11 Eq. 446; *Banks v. Gibson*, 34 Beav. 566; *Dent v. Turpin*, 2 Johns. & Hem. 139; *Collins Co. v. Brown*, 3 K. & J. 423; *Emperor of Austria v. Day*, 3 De G. F. & J. 217; *Marshall v. Ross*, L. R. 8 Eq. 651; *Gillott v. Esterbrook*, 47 Barb. 455; *Congress and Empire Spring Co v. High* Rock Spring Co., 57 Barb. 526; 45 New York, 291; *Woodward v. Lazar*, 21 Cal. 448; *Walton v. Crowley*, 3 Blatchf. C. C. 440; *Hostetter v. Vowinkle*, 1 Dillon C. C. 329; *Filley v. Fassett*, 44 Missouri, 168; *Davis v. Kendall*, 2 R. Island, 566.

¹ 16 U. S. Stat. at Large, 210.

² Browne on Trade-Marks.

³ 11 H. L. Cas. 523.

⁴ 10 Jurist (N. S.) 81.

mark for which protection is sought must not itself deceive the public,¹ and secondly, that the imitation, to be an infringement, must be one calculated to deceive a purchaser using ordinary caution.

But it must be remembered that while the *test* of an infringement may be whether or not the public, exercising ordinary caution, are deceived, yet the *ground* upon which the jurisdiction of the court rests, in such cases, is not the fraud upon the public, but the invasion of property.²

457. Any name, symbol, or emblem may, in general, be a trade-mark.

But a word which is merely descriptive of the article, or which is the current name of an article, or which merely denotes the general character of the business, cannot be used as a trade-mark.^{3*}

The name of a country or section of a country cannot be appropriated as a trade-mark by the owner of a particular product (*e. g.* coal), of that country, so as to exclude owners of other similar products coming from the same country or section of country, from using the name.⁴ But it seems that the use of the name of a country, by a person whose merchandise does not in fact come from that country, will be enjoined; and if the name of a country is stamped or branded upon the article, it may become a trade-mark.⁵

A man's name may be a trade-mark; and it may become one to such an extent as to prevent any other person of the same name from using his own name in connection with a similar article.⁶

¹ The maxim that "he who comes into a court of equity must come with clean hand" applies in such cases; *Palmer v. Harris*, 10 P. F. Sm. 156. See, also, *Pidding v. How*, 8 Sim. 477; *Flavel v. Harrison*, 10 Hare, 467. See, however, *Ford v. Foster*, L. R. 7 Ch. App. 611.

² See the opinion of Lord Westbury in 10 Jur. (N. S.) 81. See, also, *Clark v. Freeman*, 11 Beav. 112; *Dixon Crucible Co. v. Guggenheim*, 2 Brews. 332; *Joyce on Injunctions*, 312.

³ *Perry v. Truefitt*, 6 Beav. 66; *Gillott v. Esterbrook*, 47 Barb. 455.

⁴ *Canal Co. v. Clark*, 13 Wallace, 311. See, also, *Newman v. Alvord*, 49 Barb. 588; *McAndrews v. Bassett*, 10 Jur. (N. S.) 550; *Seixo v. Provezende*, L. R. 1 Ch. App. 192; *Amoskeag Manufac. Co. v. Spear*, 2 Sanf. Sup. Ct. 599; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402.

⁵ *McAndrews v. Bassett*, 10 Jur. (N. S.) 550.

⁶ *Holloway v. Holloway*, 13 Beav. 209; *Burgess v. Burgess*, 8 De G. M. & G. 896.

A man cannot acquire a trade-mark until the article to which it is applied is actually made and put in the market. Thus an injunction was refused to a publisher, who had announced, but had not actually published, a magazine called "Belgravia," to restrain another publisher who had hastily brought out another magazine bearing the same name, from continuing to use that title.¹

458. In order to obtain relief for the protection of a trade-mark it is necessary that due diligence should be used, and it is further necessary that the trade-mark itself should not contain any misrepresentations; for (as stated above) a trade-mark which is false and thereby calculated to deceive the public, will not be protected by a court of equity.²

Any imitation of a trade-mark whereby an ordinary purchaser might be deceived into the belief that the article he was buying was produced or manufactured by the owner of the trade-mark, is an infringement. It has often happened that differences have been introduced by persons desiring to infringe a trade-mark in order to escape from the rule above stated; but all such colorable differences are disregarded by the court, if the general result is a misrepresentation.³

The remedies which equity applies to cases of infringement of trade-marks, are those already noticed in patent-right and copyright cases, viz., an injunction, an account, and an inquiry into damages.

459. Another class of cases in which injunctions are issued, is where irreparable damage may be done by the alienation of property prior to or pending litigation, or even where no litigation may be in contemplation. One of the most striking instances of this class of cases is the restraining the transfer of negotiable instruments which have been fraudulently, illegally, or improperly obtained, or which ought not to be negotiated.⁴ From the nature of these instruments it is obvious that if they once get into the

¹ Maxwell v. Hogg, L. R. 2 Ch. App. 307.

² Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas. 523.

³ See Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas. 523; Glenny v. Smith, 2 Dr. & Sm. 476; Seixo v. Provezende, L. R. 1 Ch. App. 192; Gil-

lott v. Esterbook, 47 Barb. 455; Walton v. Crowley, 3 Blatchf. C. C. 440; Clark v. Clark, 25 Barb. 76; Brooklyn White Lead Co. v. Masury, *Id.* 416; Williams v. Johnson, 2 Bosw. 1; Kerr on Injunctions, 484.

⁴ Smith v. Haytwell, Amb. 66; 3 Atk. 566; Kerr on Injunctions, 595.

hands of an innocent holder for value, irreparable injury may be done to the party liable thereon, by depriving him of the opportunity of making a defence which he would otherwise be entitled to set up. Hence the jurisdiction to restrain the negotiation of such instruments upon a proper case being made out, is well established both in England and in this country.¹ So also transfers of stock; sales of valuable chattels to which the complainant claims title; sales and mortgages of estates by a mortgagor who had improperly obtained the deeds from a mortgagee; and vexatious alienations of property pending litigation, may all be restrained by injunction.² Equity, however, will not interfere to restrain a debtor from alienating his property, at the suit of a creditor who has not reduced his claim to judgment.³

460. Still another class of cases in which equity interferes, is where property which is the subject of litigation, is in danger of injury, and the interposition of the court is necessary for its protection. It will be remembered that technical waste could only exist when the party committing it was lawfully in possession, and that, therefore, if his claim was hostile, the remedy by injunction against waste, strictly speaking, did not lie.⁴ Where, however, special circumstances exist, as when the party in possession is insolvent, and unable to respond in pecuniary damages; or where his actions are such as to deprive the land of its chief value, an injunction may issue to protect the property pending litigation.⁵ This is especially so in the case of mines, for there the injury goes to the very substance of the estate.⁶ But any injury which is not adequately reparable by damages, would be a sufficient foundation for the application.⁷

¹ *Metler v. Metler*, 3 C. E. Green, 270; 455. See, also, *Clark's Appeal*, 12 P. F. 4 *Id.* 457. See *Ferguson v. Fisk*, 28 Conn. 501; *High on Injunctions*, § 712. See, also, *Osborn v. The Bank of the United States*, 9 Wheat. 788.

² *Kerr on Injunctions*, 590, 593, 594; *High on Injunctions*, § 251.

³ *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Buchanan v. Marsh*, 17 Iowa, 494; *High on Injunctions*, § 250. The rights of a judgment creditor will be protected so as to restrain the judgment debtor from committing acts in the nature of waste; *Witmer's Appeal*, 9 Wright (Pa.),

⁴ *Pillsworth v. Hopton*, 6 Ves. 51. See, however, *Shubrick v. Guerard*, 2 Desaus. 616, note.

⁵ *Meadow Valley v. Dodds*, 6 Nev. 261; *Kinsler v. Clarke*, 2 Hill, Ch. 617; *Hicks v. Michael*, 15 Cal. 107; *Peak v. Hayden*, 3 Bush, 125. See, also, *Kane v. Vanderburgh*, 1 Johns. Ch. 11.

⁶ *United States v. Parrott*, McA. C. C. 271.

⁷ *Kerr on Injunctions*, 199.

The object of the court in granting such injunctions is to preserve the property in *statu quo* pending litigation. The complainant, however, in order to obtain the relief must present a fair *prima facie* case; and in order to secure the decision of the court without a trial at law, the case must be very clear and plain.¹ In cases of a doubtful character, the court will either direct the complainant to establish his title at law in the first instance, or grant an injunction pending the litigation, according to circumstances, or the exigencies of the particular case. *Interim* orders are sometimes made, whereby the property is preserved without issuing the formal writ.²

461. The remedy by injunction to restrain the breach of negative covenants, may be said to furnish the complement to the relief by specific performance. An affirmative covenant is an agreement whereby a man undertakes that something shall be done; and upon the breach of such a covenant, and upon a proper case for equitable interference being made out, the remedy is by a bill for specific performance. On the other hand, by a negative covenant, the covenantor promises that something shall *not* be done; and, therefore, the relief appropriate to a breach of such a contract is an injunction.

Injunctions to restrain breaches of negative covenants are issued when the contract and the threatened breach are clearly shown, and where the recovery of damages at law would furnish an inadequate redress. While the theory upon which this relief is based is that of preventing irreparable injury, yet the court will not enter into nice discriminations as to the extent of the damage. The mere fact that there has been a breach of covenant, is a sufficient ground for interference; and it is no answer to say that the act complained of will inflict no injury upon the complainant, or will even be a positive benefit to him.³

462. The leading authority upon this subject is, perhaps, *Lumley v. Wagner*.⁴ There the defendant had entered into an engagement with the plaintiff to sing at his theatre, and not to sing at any other theatre; and an injunction was granted by Lord St. Leonards restraining her from singing at any other

¹ Kerr on Injunctions, 208, 209.

² *Id.* 212.

³ Kerr on Injunctions, 532; High on Injunctions, §§ 695, 717.

⁴ 1 De G. M. & G. 604.

theatre. It was held in that case, overruling the former decisions,¹ that the circumstance that the court would have been unable to specifically enforce the defendant's affirmative covenant to sing, did not affect the complainant's right to an injunction to restrain a violation of the negative covenant; and this is, perhaps, the correct doctrine, although there have been decisions the other way.²

463. The instances in which injunctions have been issued to restrain the breach of negative covenants are very numerous. Thus injunctions have been issued to restrain a person who had entered into a covenant not to ring church bells, from so doing;³ to restrain an author, who, on the sale of a work, had covenanted with the purchaser not to do anything which might be detrimental to the sale or publication of that work, from publishing a rival work on the same subject;⁴ to restrain tenants from violating covenants in their leases as to the mode of cultivation, or the removal of machinery;⁵ to restrain the erection of buildings beyond a certain height;⁶ to restrain the carrying on of particular trades in demised premises;⁷ and in many other cases too numerous to mention.⁸ The jurisdiction is frequently exercised for the purpose of enforcing contracts in proper restraint of trade,⁹ the principles of which have been already explained; and also to enforce covenants which do not run with land, but of which the vendee had notice, and of which an observance on his part will, therefore, be compelled in equity.¹⁰

The mere fact that the covenant provides for a penalty upon its breach, is no ground for refusing an injunction.¹¹

¹ *Kemble v. Kean*, 6 Sim. 333; *Kimberley v. Jennings*, *Id.* 340; *Kerr on Injunctions*, 528.

² *Sanquirico v. Benedetti*, 1 Barb. 315; *Hills v. Croll*, 2 Phillips, 60.

³ *Martin v. Nutkin*, 2 P. Wms. 266.

⁴ *Barfield v. Nicholson*, 2 Sim. & Stu. 1.

⁵ *Fleming v. Snook*, 5 Beav. 250; *Grey de Wilton v. Saxon*, 6 Ves. 106; *Pultenex v. Shelton*, 5 Ves. 260, n.; *Hamilton v. Dunsford*, 6 Irish Ch. 412.

⁶ *Lloyd v. London, Chatham and Dover Railway Co.*, 2 De G. J. & Sm. 568.

⁷ *Kemp v. Sober*, 1 Sim. N. S. 517;

Hodson v. Coppard, 29 Beav. 4; *Clements v. Welles*, L. R. 1 Eq. 200; *Parker v. Whyte*, 1 Hem. & M. 167.

⁸ *Kerr on Injunctions*, 503, 504, 505.

⁹ *Butler v. Burleson*, 16 Verm. 176; *McClurg's Appeal*, 8 P. F. Sm. 51.

¹⁰ *Tulk v. Moxhay*, 11 Beav. 571; 2 Ph. 774. See, also, *Clements v. Welles*, L. R. 1 Eq. 200; *Wilson v. Hart*, L. R. 1 Ch. App. 463; *Western v. McDermott*, 2 *Id.* 72.

¹¹ *Hardy v. Martin*, 1 Cox, 26. See *ante*, p. 187, and authorities cited in note 4.

464. A negative quality will sometimes be imported into an affirmative covenant, and relief afforded by injunction. Thus lessees who had covenanted to manage land or cultivate a farm in a husband-like manner, have been restrained from doing acts of bad-husbandry, although there was no express covenant to refrain from such acts.¹ But where the affirmative agreement cannot be specifically enforced, the court will not import into it a negative covenant. Thus, where a defendant had agreed to take notes of cases in court, and compose reports for the plaintiff, but had failed to do so, an injunction to restrain him from making reports for other persons was refused.² Other instances will be found in the cases cited in the note.

Injunctions to restrain breaches of covenant may, if the occasions require it, be of a mandatory character.³

465. The last class of cases in which injunctions are granted, which will be particularly noticed, embraces those in which the writ is issued in the case of corporations.

Many cases of this description fall under the jurisdiction of equity upon the subject of trusts; and this jurisdiction, of course, authorizes a court of chancery to interfere wherever the property of a corporation can, under the conditions of its corporate birth, be treated as trust funds, and there is an attempt to apply the property to purposes foreign to the objects of the corporation, in other words, foreign to the trust. The theory upon which the remedy by injunction is administered in such cases is, simply, that the court will interfere to prevent a breach of trust. Thus it has been held in several cases, that, where property is conveyed to a religious corporation upon the trust, either expressed or sufficiently implied, that it is to be held for the benefit of a set of men holding certain religious doctrines, the

¹ *Drury v. Molins*, 6 Ves. 328; *Pratt v. Brett*, 2 Madd. 62; *Kerr on Injunctions*, 522.

² *Clarke v. Price*, 2 Wils. C. C. 157; *Pickering v. Bishop of Ely*, 2 Y. & C. C. 249; *Johnson v. Shrewsbury and Birmingham Railway Co.*, 3 De G. M. & G. 914; *Kerr on Injunctions*, 524. The

distinction between these cases, and cases such as *Lumley v. Wagner* (*supra*), is that in the latter the negative covenant was expressed.

³ *Lane v. Newdigate*, 10 Ves. 192; *Whittaker v. Howe*, 3 Beav. 383; *Kerr on Injunctions*, 534.

court will interfere to restrain a use of the property for the benefit of those who do not hold the prescribed doctrines.¹

Indeed, the ground upon which the jurisdiction of courts of chancery in cases of injunction to restrain corporate action has been put by text writers of very considerable authority, has been solely a breach of trust;² but it is submitted, with deference, that this view of the jurisdiction is somewhat too limited, for it would seem that a court of equity would usually interfere to restrain acts of corporations *ultra vires*, when these acts resulted or were likely to result in injury to the stockholders, without regard to the question whether there had been a technical breach of trust. Be this as it may, the equity jurisdiction in the United States over corporations has been very extensively exercised. Thus in Pennsylvania this is not only one of the distinct heads of jurisdiction conferred by statute,³ but it has been treated as one of those equitable powers which are inherent in courts of chancery.⁴ Bills to restrain corporate action within proper limits are, therefore, very frequent in the United States, and they are used in cases of corporations of a municipal and public kind, as well as those of a private, or mercantile, or eleemosynary character.⁵ The jurisdiction of the court may, also, be invoked to prevent the franchise of a corporation from being destroyed.⁶

A corporation, however, cannot be compelled to perform a

¹ Schnorr's Appeal, 17 P. F. Sm. 138; Roshi's Appeal, 19 *Id.* 462; Watson v. Jones, 13 Wallace, 679; High on Injunctions, chap. v.

² Kerr on Injunctions, 570; High on Injunctions, § 761.

³ See *ante*, Introduction, Chap. I., p. 21, note.

⁴ See Commonwealth v. The Bank of Pennsylvania, 3 Watts & Serg. 193.

⁵ See Delaware and Raritan Canal v. Raritan and Delaware Bay R. R. Co., 1 C. E. Green, 378; Newark Plank Road Co. v. Elmer, 1 Stockt. 754; Kean v. Johnson, *Id.* 401; Gifford v. The New Jersey R. R. Co., 2 *Id.* 171; People v. New York, 32 Barb. 102; Scofield v. Eighth, etc., 27 Conn. 499; Sheldon v. Centre, etc., 25 *Id.* 224; Commonwealth

v. Bank, 4 Allen, 1; March v. Eastern Railway Co., 40 N. Hamp. 548; Philadelphia and Erie R. R. Co. v. Catawissa R. Co., 3 P. F. Sm. 20; Winebrenner v. Colder, 7 Wright (Pa.), 244; Manderson v. Commercial Bank, 4 Casey, 379; Sturges v. Knapp, 31 Verm. 1; Stevens v. Rutland and Burlington R. R., 29 *Id.* 545; Nazro v. Merchants' Ins. Co., 14 Wis. 295; Grand Trunk Railway v. Cook, 29 Ill. 237; Carter v. City of Chicago, 57 *Id.* 283; Durfee v. Old Colony R. R. Co., 5 Allen, 230; Peabody v. Flint, 6 *Id.* 52; Dodge v. Woolsey, 18 How. 341. See, also, Colman v. Eastern Counties Railway Co., 10 Beav. 1; Simpson v. The Hotel Co., 8 H. L. Cas. 712.

⁶ Osborn v. Bank of the United States, 9 Wheat. 738.

public duty at the suit of a private individual, without some special right or authority.¹

In leaving the subject of injunctions it should be remembered that the examples given of the application of this equitable remedy to the cases which have been discussed are, after all, only illustrations of the jurisdiction, and are not to be regarded as an exhaustive catalogue of all the cases in which this remedy can be applied. The field of this jurisdiction is an exceedingly wide one, and scarcely any injury to the rights of property can be imagined where the writ would not issue, if the remedy at law was inadequate, and the only efficient redress would be the *restraint* of the commission or continuance of the wrongful act.

CHAPTER III.

RE-EXECUTION, REFORMATION, RESCISSION, AND CANCELLATION.

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| 466. Reason for the existence of these equitable remedies. | 473. Cancellation as applied in the rescission of voidable contracts. |
| 467. Re-execution. | 474. Cancellation independent of rescission. |
| 468. Reformation. | 475. Relief by rescission and cancellation a matter of judicial discretion. |
| 469. General principles in such cases. | 476. Compensation. |
| 470. Admissibility of parol evidence. | 477. Rule in England; Sir Hugh Cairns's Act. |
| 471. Reformation under presumption of law. | 478. No uniform rule on this subject in the United States. |
| 472. Rescission; voidable contracts, how far good. | |

466. It has been stated in a former chapter that in order to render the circle of equitable relief in the case of contracts and duties complete, it is necessary that not only should a suitor in chancery obtain redress by virtue of bills for specific performance and injunction, but that there should also exist some remedy by means of which a lost writing may be supplied, an

¹ *Buck Mountain Co. v. Lehigh Coal* panies and corporations, see *Redfield on Co.*, 14 *Wright (Pa.)*, 91. Upon the *Railways*, 825; *Kerr on Injunctions*, general subject of the jurisdiction of chaps. xxiii. and xxiv.; and *High on equity by way of injunction over com-* *Injunctions*, chaps. v. and xvii.

instrument which has been erroneously framed corrected, and documents obtained through fraud or *duress* surrendered. Hence there arises the necessity for bills for Re-execution, Reformation, and Cancellation, which may be appropriately considered immediately after the subjects of the two preceding chapters.

467. The remedy of Re-execution is applicable to cases in which deeds or other instruments are lost or destroyed; and is the method by which equities growing out of accident are sometimes enforced. Very frequently in cases of accident the redress which a party seeks is not only that the lost instrument shall be re-executed, but that further relief shall be administered by directing a performance on the part of the defendant of the duty for which he was bound by the instrument, and for the non-performance of which, were it not for the loss, he could have been held answerable in a common law action. Thus in former times, and when the strictness of the common law rule in regard to *profert* had not been relaxed,¹ the relief in equity in the case of a lost bond extended not only to re-execution, but also, for the purpose of avoiding circuitry of action, to a decree for the payment of the debt.² In such a case (it will be observed) the object of the complainant is to obtain a payment of the money due upon the bond, to accomplish which he was originally compelled to resort to equity in consequence of a rule of pleading which prevented his recovery in a common law action. Here, therefore, the ultimate relief sought is not re-execution but payment.

But cases may sometimes arise in which re-execution is the principal or only redress which is required; and here the equitable remedy now under consideration is particularly called into play. An illustration of the necessity for this equitable remedy may be found in those cases in which a deed has been lost, and a title is, therefore, in danger of being rendered unmarketable by the absence of one of the links in the chain. Thus, if a conveyance to a purchaser has accidentally been burned, the seller will be compelled upon a resale to join in a conveyance to the new purchaser, or if the estate is not resold to again convey to the first purchaser.³ In a case of this kind the interposition

¹ See *ante*, p. 183.

² Adams's Eq. 167.

³ *Bennett v. Ingoldsby*, Finch, 262;

2 Sug. V. and P. 41 (8th Am. ed.).

of the chancellor is sought solely upon the ground of the efficiency of the equitable remedy, and no relief is asked for beyond the simple re-execution of the lost or spoliated instrument. Of course in applying this remedy the court will act in obedience to the general principles by which its interposition is usually regulated; and as one of those principles consists in the discouragement of carelessness or negligence, a decree may be refused if the loss or destruction of the instrument has happened through the fault of the complainant.¹

468. The remedy of Reformation is obviously one which is necessary to the complete and exact administration of justice; and which, moreover, can be attained by equitable procedure alone. A court of law may construe and enforce an instrument as it stands, or may refuse upon proper cause shown to give any effect to it, or may treat it as a nullity. But it is plain that if the instrument has not been drawn so as to express the true intention of the parties, to enforce it in its existing condition would be simply to carry out the very mistake or fraud complained of; while to set it aside altogether might deprive the plaintiff of the advantages of a contract to which he is lawfully entitled. It is obvious, therefore, that the only true measure of justice in such a case is the equitable remedy by reformation (or correction, as it is sometimes called), by means of which the instrument is made to conform to the intention of the parties, and is then enforced in its corrected shape.

The occasions which most frequently give rise to this equitable remedy are cases of mistake and fraud. Thus, where a settlement is executed with the design of carrying out prior articles, but which is so drawn by mistake that it fails to conform to the intention as expressed in the articles, a bill in equity will lie for the purpose of reforming the instrument so that the original intention of the parties to the settlement may not be defeated.² And so where, through artifice, the written evidence of a contract is drawn in such way that the terms of the agreement are not accurately expressed, the party injured by the

¹ See *Hoddy v. Hoard*, 2 Carter (Ind.), Eq. 20, and notes; *Perry on Trusts*, § 474. 359; *ante*, p. 66.

² *Glenorchy v. Bosville*, 1 Lead. Cas.

fraud may come into equity for the purpose of having the instrument corrected, and the contract, as reformed, enforced.

Bills which seek to have absolute deeds declared to be mortgages, and for the consequent enforcement of the mortgagor's equity of redemption, are illustrations of this species of reformation.¹

469. The general nature of mistake and fraud has been attempted to be explained in former chapters. What we have to do with now is the method in which the court applies the equitable remedy of reformation, for the purpose of redressing injuries growing out of mistake or fraud. The general principles by which the court is guided in such cases are well settled. A person who seeks to rectify a deed on the ground of mistake must establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution; and, also, must be able to show exactly and precisely the form to which the deed ought to be brought.²

To *reform* a contract, and then enforce it in its new shape, calls for a much greater exercise of the power of a chancellor than simply to set the transaction aside. Reformation is a much more delicate remedy than rescission. Hence, in order to justify a decree for reformation in cases of pure mistake, it is necessary that the mistake should have been mutual.³ Where the mistake has been on one side only, the utmost that the party desiring relief can obtain is rescission, not reformation.⁴ The case is, of course, different if any element of fraud exists; for it has been properly held that where there is mistake on one side, and fraud on the other, there is a case for reformation.⁵

470. The difficulties which arise in these cases grow, principally, out of questions of evidence. Where the instrument recites an agreement which it professes to carry out, but fails to do so,

¹ See *ante*, chap. on Mortgages.

³ *Ante*, page 194.

² By the Lord Chancellor in *Fowler v. Fowler*, 4 De G. & J. 265. See, also, *Stockridge v. Hudson Iron Co.*, 107 Mass. 290.

⁴ *Bellows v. Steno*, 14 N. Hamp. 175; *Cooper v. The Farmers' Ins. Co.*, 14 Wright (Pa.), 299.

⁵ *Welles v. Yates*, 44 New York, 525.

the case for reformation is perfectly clear ; but where there is no recital of any prior agreement, but the alleged mistake is attempted to be proved by extrinsic evidence, the limits of the equity for correction are more difficult to define.¹ The distinction which ought to be borne in mind seems to be between those cases in which the intention of the parties has not been accurately expressed, and those in which the intention, though accurately expressed, has been reached through some misapprehension or ignorance.² In the first class of cases the true remedy is reformation, and evidence is admissible to show what the intention of the parties really was. Thus, to refer to an instance cited in a former chapter, if there is an agreement that part of the purchase-money of certain real estate should be paid by a judgment note for a certain sum, "with interest," and these words are omitted from the note by mistake, it is competent to show this omission by parol evidence for the purpose of obtaining a decree correcting the instrument.³ The general principle, therefore, that where no statutory provision intervenes, parol evidence is admissible for the purpose of correcting a mistake in a written instrument, and of carrying it into effect as corrected (in other words, for the purpose of applying the equitable remedy of reformation), has, accordingly, been adopted by many decisions throughout the United States ; but relief will be granted only where there is a plain mistake clearly made out by satisfactory proofs.⁴ The same result now seems to have been reached in England ; although there is great reluctance to admit parol testimony unless it is corroborated by other evidence.⁵ And on both sides of the Atlantic it now seems to be established that the courts may, under certain circumstances, and when the

¹ Adams's Eq. 169. See *Bold v. Hutchinson*, 5 De G. M. & G. 558, 568 ; 2 Spence Eq. 140, 141.

² See *ante*, p. 193, Accident and Mistake.

³ *Gump's Appeal*, 15 P. F. Smith, 476 ; and see the other cases cited, *ante*, p. 193, note 3.

⁴ See *Gillespie v. Moon*, 2 Johns. Ch. 595 ; *Lyman v. Little*, 15 Verm. 576 ;

Whitney v. Whitney, 5 Dana, 330 ; *Stockbridge v. Hudson Iron Co.*, 107 Mass. 290 ; 1 Sug. V. and P. 262 (8th Am. ed.) ; notes to *Woollam v. Hearn*, 2 Lead. Cas. Eq. 683 (3d Am. ed.) ; *ante*, p. 193.

⁵ See *Alexander v. Crosbie*, Ll. & G. (temp. Sug.) 145 ; *Mortimer v. Shortall*, 2 Dr. & War. 363 ; *Kerr on Fraud and Mistake*, 423 ; 1 Sug. V. and P. 262 (8th Am. ed.).

parol evidence is very conclusive, grant the relief sought, even though the mistake is denied by the answer of the defendant.¹

Where the statute of frauds intervenes, the admissibility of parol evidence is necessarily attended with greater difficulty. The authorities upon this subject have already been noticed in the chapter on specific performance; it will, consequently, be sufficient to refer to the conclusion there stated.²

In cases of fraud there is less reluctance to admit parol evidence for the purpose of reforming a written contract than in cases of bald mistake.

Thus it was said in a former chapter that parol evidence was admissible for the purpose of showing that a deed absolute on its face was intended to be a mortgage, and, therefore, that the grantor should be entitled to avail himself of his equity of redemption.³ This is the rule in most of the States of the Union;⁴ but in Massachusetts, Maine, Connecticut, New Hampshire, and perhaps some other States, parol evidence, in such cases, seems to have been considered inadmissible;⁵ although in some of these

¹ *Fowler v. Fowler*, 4 De G. & J. 273; *Gray v. Woods*, 4 Blackf. 432. See, also, the cases cited in the two preceding notes; and *Kerr on Fraud and Mistake*, and *Sugden V. and P.*, *ut sup.*

² See *ante*, p. 353. This subject was elaborately examined in the case of *Glass v. Hulbert*, 102 Mass. 31, where the rule was laid down to be that "when the proposed reformation of an instrument involves the specific performance of an oral agreement within the statute of frauds, or when the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right, which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel to deprive the party of the right to set up that defence" (citing *Jordan v. Sawkins*, 1 Ves., Jr.

402; *Osborn v. Phelps*, 19 Conn. 63; *Clinan v. Cooke*, 1 Sch. & Lef 22); but that "a rectification by making the contract include obligations or subject matter, to which its written terms will not apply, is a direct enforcement of the oral agreement, as much in conflict with the statute of frauds as if there were no writing at all."

³ *Ante*, p. 160.

⁴ *Russell v. Southard*, 12 Howard, 139; *Morgan v. Shinn*, 15 Wal. 105; *Marks v. Pell*, 1 Johns. Ch. 594; *Horn v. Keteltas*, 46 N. Y. 605; *Sweet v. Parker*, 7 C. E. Green, 453; *Odenbaugh v. Bradford*, 17 P. F. Sm. 96; *Maffitt v. Rynd*, 19 *Id.* 387; *Conner v. Chase*, 15 Verm. 764; *Bank of Westminster v. Whyte*, 1 Maryl. Ch. 586; 3 *Id.* 508; *Webb v. Rice*, 6 Hill, 219; *Conwell v. Evill*, 4 Blackf. 67; *Sugden V. and P.* 267 note; 2 Wash. Real Prop 50 *et seq.*; *ante*, p. 160, note 2.

⁵ 1 *Sugden V. and P.* 267, note.

States the question cannot, perhaps, be considered as definitely settled.¹

471. In addition to reforming instruments by direct evidence, in cases of fraud or mistake, correction will be sometimes made by presumption of law, or rather of equity.² Thus where a joint and several debt exists, and a bond is afterwards given to secure the same which is drawn in such a way as to make the obligation merely joint and not joint and several, equity will reform the instrument upon the presumption that the writing by which the debt was to be secured was intended to follow in its terms the nature of the debt itself, and the correction will therefore take place in favor of the presumed intention of the parties.³ Indeed some cases have gone still further, and it has been held that whenever a loan is made to two jointly it will be presumed in equity that every debtor was to be permanently liable until the money should be paid; and that therefore a debt so arising, though at law it is the joint debt of all the co-debtors, shall be treated in equity as the several debt of each;⁴ but it has been doubted whether these authorities have not carried the doctrine under consideration too far.⁵ The doctrine will not apply when the original creation of the debt was in the form of a joint obligation, for in such a case there can be no presumption that the contract of the parties was meant to assume a different shape, and equity will not interfere upon conjecture merely.⁶ Nor will such a presumption be entertained in the case of a mere surety, whose duty is measured solely by the legal force of the bond, and who is under no moral obligation to pay the obligee independent of his covenant. There is nothing, therefore, in such a case, on which to found an equity for the interposition of a court of chancery.⁷ Where, however, the evidence plainly establishes

¹ See *Newton v. Fay*, 10 Allen, 505; *Howe v. Russell*, 36 Maine, 115.

² *Wyche v. Green*, 11 Geo. 172.

³ *Hyde v. Tanner*, 1 Barb. 75; *Weaver v. Shryock*, 6 Serg. & R. 262; *Pickersgill v. Lahens*, 15 Wallace, 144. See, also, *Stiles v. Brock*, 1 Barr, 215.

⁴ *Simpson v. Vaughan*, 2 Atk. 31;

Thorpe v. Jackson, 2 Y. & C. Exch. 553.

See *United States v. Price*, 9 How. 103.

⁵ *Jones v. Beach*, 2 De G. M. & G. 886.

⁶ *Sumner v. Powell*, 2 Meriv. 30; *Underhill v. Horwood*, 10 Ves. 209; *Jones v. Beach*, 2 De G. M. & G. 886; *Moser v. Libenguth*, 2 Rawle, 428.

⁷ *Pickersgill v. Lahens*, 15 Wallace 144.

the fact that the intention of the parties was to make the instrument several as well as joint, it will be reformed even as against the estate of one who was only a surety.¹

Upon the same principle of reformation, if a mortgage is made of a wife's property, and the equity of redemption is limited to the husband alone, and it appears from all the circumstances of the case that nothing more was intended to affect it (the property of the wife) than the creation of a mortgage, equity will interfere by reforming the instrument, and restoring the equity of redemption to the wife.²

472. It has been stated in a former chapter that in certain cases of fraud and mistake the proper redress which ought in justice to be afforded to the injured party is that the transaction into which he has entered should be set aside, and the written evidence thereof surrendered or destroyed. Some of the rules also upon which a court of equity acts in cases of rescission have been attempted to be pointed out; such as those which relate to the admissibility of parol evidence in such cases, and those also by which the loss of the complainant's right to relief through confirmation, acquiescence, or delay is controlled. In addition to the above, it may be stated here, that a transaction which is capable of being rescinded on the ground of fraud, is to be treated as good until rescinded, and not as bad until confirmed, or, in other words, that a contract which *may* be set aside at the option of the injured party, is to be considered as being in effective operation until that party takes measures to enforce his right to rescind.³ This was well put by Mr. Mellish,⁴ in his argument in *Oakes v. Turquand* before the House of Lords, in the following query: when you say that an agreement is voidable and not void, and when the complainant endeavors to insist upon his right to treat it as void, is the agreement to be taken as valid until rescinded, or, when rescinded, to be taken to have been void from the first? And this query was answered by the tribunal to which it was addressed to the effect that the

¹ *Olmsted v. Olmsted*, 38 Conn. 318.

² *Demarest v. Wynkoop*, 3 John. Ch. 129; *Whitebread v. Smith*, 3 De G. M. & G. 737.

³ It will be remembered that the injured person must, in many cases, be very prompt. See *ante*, p. 254.

⁴ Afterwards Lord Justice Mellish.

agreement *was* to be taken as subsisting until rescinded; but with this important qualification, that it was not to be considered as rescinded only as of the date of the decree of the court setting the transaction aside, but as of the date of the unequivocal and open declaration of the injured party that he demands a rescission, followed, upon a refusal, by a prompt application to the courts.¹

Rescission, however, is a *right* of the complainant, and not a means for the assertion thereof; it is an *equity*, rather than an equitable remedy. In enforcing this equity, a court of chancery will, as the necessities of the case require, afford relief either by directing a reconveyance, or by simply ordering an instrument to be surrendered for cancellation. This relief is based upon equities which have been already considered, viz., fraud and mistake; and the decrees which are made in such cases are naturally in accordance with the general course and practice of chancery which always aims at specific relief.

473. Where a decree for the delivery up and cancellation of an instrument is made in such cases, it is founded upon the theory that a man suffers a wrong where an instrument is left outstanding, which is the evidence of a void or voidable transaction, and which could only be used for a sinister purpose. Even, therefore, where the instrument is *void*, the decree may contain a direction for its delivery and cancellation;² *a fortiori* will this be done where the instrument is evidence of a merely voidable transaction,³ and above all if it is of a negotiable character.⁴

474. But in some cases the right of the complainant to resort to the court depends solely upon the necessity for getting in and cancelling an instrument without any allegation that it is the evidence of a void or voidable transaction, but simply on the ground that, for some reason or other, the instrument itself may be productive of annoyance or vexatious litigation.

A striking illustration of this may be found in the cases

¹ *Oakes v. Turquand*, L. R. 2 H. L. Cas 325. See, also, *Reese River Mining Co. v. Smith*, 4 *Id.* 64.

² *Hamilton v. Cummings*, 1 Johns. Ch. 520 to 524; *Story's Eq. Jurisp.*, § 700.

³ See *Bromley v. Holland*, 7 Ves. 3; *Wilson v. Getty*, 7 P. F. Sm. 266.

⁴ *Minshaw v. Jordan*, 3 Bro. C. R. 174, *Belt's note*; *Metler v. Metler*, 3 C. E. Green, 270; 4 *Id.* 457; *Ferguson v. Fisk*, 28 Conn. 501.

where forged instruments have been ordered to be given up; and where a deed has been directed to be cancelled, although it may have become a mere nullity, because it created a cloud upon a title.¹ The jurisdiction of courts of equity in cases of this kind is exercised *quia timet*, that is, because of a fear of future or contingent harm. The same principle applies to bills filed for other purposes, and has, indeed, given its name to this peculiar class of bills, which will be noticed hereafter.²

475. It is a familiar principle of equity that the application of the relief by rescission and cancellation rests in the sound discretion of the court; and that a chancellor may refuse to interfere for the purpose of setting a transaction aside, when he would at the same time decline to enforce its specific performance. In such cases the court simply declines to exercise its jurisdiction, and leaves the parties to their legal remedies, whatever they may be.³

476. The remedies by specific performance, injunction, reformation, and cancellation, would seem to embrace the whole circle of duties and obligations, and furnish appropriate redress for any violation of the same. There is, however, one case still remaining in which these remedies may possibly fail to furnish exact justice, and that is when the execution of a decree for specific performance or for an injunction has become impossible. In such a case the question arises: Is the complainant's bill to be dismissed? Or is any relief to be afforded him by way of compensation?

The tendency of courts of equity in this country is somewhat in favor of affording relief in proper cases by compensation; although there are decisions and opinions, entitled to great weight, in which a different view has been adopted.⁴

477. In England, prior to the statute 21 & 22 Vic., c. 27 (commonly known as Sir Hugh Cairns's Act), damages or compensation were decreed in favor of a complainant in equity only as

¹ *Peake v. Highfield*, 1 Russ. 559; *Cook v. Cole*, 2 Halst. Ch. 522, 527; *Banks v. Evans*, 10 Sm. & Marsh. 35; *Lisle v. Liddle*, 3 Anst. 649; *Ryan v. Mackmath*, 3 Bro. C. R. 15 (Belt's notes). ² See *Beck v. Simmons*, 7 Ala. 71; *Watkins v. Collins*, 11 Ohio, 31; *Kirby v. Harrison*, 2 Ohio, N. S. 326. ³ See 3 Parsons on Contracts, 403 (6th ed.).

⁴ *Post*, Chap. ix.

incidental to other relief sought by the bill and actually granted, or where there was no adequate remedy at law, or where some peculiar equities intervened. By that statute it is in substance enacted that in cases of contracts, where the court has jurisdiction by way of injunction or specific performance, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured either in addition to, or in substitution for such injunction or specific performance.¹

There had, indeed, been some decisions in England in which the right of a court of equity to decree compensation for the injury sustained by the non-performance of a contract in the event of the primary relief for a specific performance failing, had been recognized; and bills were not unfrequently filed in which such relief was prayed.² But the case of *Denton v. Stewart*,³ in which that doctrine was promulgated, was subsequently overruled;⁴ and the law was stated by Lord St. Leonard, in the last edition of his *Treatise on Vendors and Purchasers*, to be against the power of the court to award compensation in such cases, independently of the statute.⁵

478. On this side of the Atlantic the decisions have not been uniform; but, perhaps, their tendency is now rather in favor of the power of the court to decree compensation. The authority of *Denton v. Stewart* was recognized by Chancellor Kent in *Phillips v. Thompson*;⁶ and although that distinguished jurist in later cases⁷ refused to act upon this decision, yet there are several more recent authorities in favor of the power of courts of equity to award compensation.⁸

¹ See *Johnson v. Wyatt*, 2 De G. J. & S. 18; *Middleton v. Greenwood*, *Id.* 142.

² See the remarks of Vice-Chancellor Sir Richard Malins in *Aberaman Iron Works v. Wickens*, L. R. 5 Eq. 505.

³ 1 Cox, 258; 1 Ves., Jr. 329, n. See also, *Greenaway v. Adams*, 12 Ves. 395; *Gwillim v. Stone*, 14 Ves. 128.

⁴ *Todd v. Gee*, 17 Ves. 279.

⁵ Sug. V. and P. 233 (Vol. I., 350, 8th Am. ed.). See, also, *Aberaman Iron Works v. Wickens*, L. R. 5 Eq. 485; L. R. 4 Ch. App. 101. The decree of the Vice-Chancellor in this case was reversed,

but upon the ground that the disappointed purchaser had a lien for the amount of the purchase-money; and the decision of the Court of Appeals is not, therefore, to be considered as an authority in favor of the doctrine that a bill would lie, in such a case, for compensation simply.

⁶ 1 Johns. C. R. 150. See, also, *Parkhurst v. Van Cortlandt*, 1 Johns. C. R. 273.

⁷ *Hatch v. Cobb*, 4 Johns. C. R. 559; *Kempshall v. Stone*, 5 *Id.* 193. See, also, *Woodman v. Freeman*, 25 Maine, 531.

⁸ *Andrews v. Brown*, 3 Cush. 130;

Thus in *Masson's* appeal,¹ a decree was made for damages for the use of a party-wall, the bill having been originally filed for an injunction to restrain the use, and an injunction having become impossible in consequence of an actual user of the wall after the institution of the suit, by agreement of the parties. And in *Nagle v. Newton*, although the compensation in that case was decreed as incidental to, and not as in substitution for other relief, the language of the court seems to approve of the exercise of the power by courts of equity to afford compensation as a distinct and independent relief.²

Under the state of the authorities, however, in the United States, it is impossible to say that any uniform rule upon this subject exists.

Jervis v. Smith, 1 Hoff Ch. 470; *Masson's Appeal*, 20 P. F. Sm. 26; *Nagle v. Newton*, 22 Grat. 814; *Oliver v. Croswell*, 42 Ill. 41; *Smith v. Kelley*, 56 Maine, 64. See, also, *Pratt v. Law*, 9 Cranch, 494; *Woodcock v. Bennett*, 1 Cowen, 711, 756; *Payne v. Graves*, 5 Leigh, 561; *Johnson v. Glancy*, 4 Blackf. 94; *Rockwell v. Lawrence*, 2 Halst Ch. 190; *Aday v. Echols*, 18 Alab. 353; *Bowie v. Stone-street*, 6 Maryl. 418.

¹ 20 P. F. Sm. 26.

² See opinion of Mr. Justice Christian in *Nagle v. Newton*, 22 Grat. 820.

CHAPTER IV.

ACCOUNT ; PARTITION ; DOWER ; BOUNDARIES ; RENT.

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| 479. General nature of the right to an account.
480. Bills for Account.
481. Inadequacy of the common law remedies.
482. Origin of the remedy in equity.
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487. Partition ; origin of jurisdiction of chancery.
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479. THE equitable remedy of Account is applied whenever it is required, as a matter of course, in all cases in which equitable titles are to be protected, and equitable rights enforced ; and, also, in many instances where jurisdiction has been assumed by virtue of equitable remedies. Thus, if a trustee violates his duty by making a profit at the expense of the trust estate, it is part of the relief to which the *cestui qui trust* is entitled, and, therefore, part of the redress which a court of equity affords, that the trustee shall *account* for the profits thus improperly made to the injury of the equitable title. So, if a conveyance tainted with fraud is sought to be set aside, it may be necessary, for a complete vindication of the equitable right which the complainant seeks to enforce, that the defendant should *account* for the rents and profits of the property which he has been fraudulently enjoying ; and this account will be accordingly ordered as part of

the relief required for the protection of the complainant's equity. The cases, already noticed, in which, in bills for injunctions, an account will be decreed, are illustrations of the mode in which this particular form of relief is applied in conjunction with other equitable remedies.

In all of the above instances the *account* plays, as it were, a subordinate part, and is used more effectually to work out equities which form the basis of the bill.

480. But there are other cases, and it is with these that we have now to do, in which the jurisdiction of courts of chancery is based solely upon the remedy of account, and in which without the necessity for this remedy the case would present no features to warrant the interposition of the chancellor. Bills filed in such cases are, in the true technical sense, bills for account, and in them the remedy itself invokes or gives rise to the jurisdiction, whereas in the instances already put, the jurisdiction, already attached, invokes or makes use of the remedy.

481. Bills for account took their rise from the inadequacy of the common law actions.

The only forms of action which were at all applicable to cases of account were *assumpsit* and *account render*.

The former lay for the balance of an account. If this balance was admitted, of course there was no difficulty; but if the balance was disputed, and it became necessary, in order to ascertain it, that the accounts between the parties should be gone over item by item, it was entirely out of the power of a jury to accomplish such a task, and the remedy accordingly failed.

The action of *account render* was more effective, but labored under several disadvantages. After the preliminary judgment, *quod computet*, the account was referred to auditors, who could indeed go over it item by item, but who had not originally the power of examining parties, although this power was subsequently conferred upon them by statute.¹ In respect to controverted items the auditors had no power of passing upon them at once, so as to carry on a continuous investigation, but were obliged to refer each disputed item to the court or a jury as a

¹ 3 & 4 Anne, c. 16.

distinct issue of law or fact;¹ and if, after the investigation had been made, and the account taken, it was found that the balance was against the plaintiff, no judgment therefor could be entered, and no payment could be enforced.²

Moreover the remedy itself was applicable to a few cases only. By the rules of the common law none could be charged in account but guardians in socage, bailiffs, or receivers, except that, in favor of merchants and for the advancement of trade, a person naming himself as merchant might have an action against another naming him merchant and charging him as his receiver. But the action did not lie between the executors and administrators of the parties; although it was subsequently extended to them by several statutes.³

482. These disadvantages of the common law remedies very naturally led to a resort to courts of equity, and bills for account consequently came to constitute a well-established head of equitable jurisdiction.⁴ In such bills a foundation is first laid for all necessary inquiries by the discovery elicited from the defendant's answer. The cause is then referred to a master, before whom the account is taken, who has the power to examine parties under oath, who can compel the production of books and documents, and by whom all the items can be passed upon subject to a revision by the court upon the coming in of his report.⁵

483. It must not be supposed, however, that a court of chancery can draw to itself every transaction between individuals in which an account between parties is to be adjusted. Its jurisdiction is limited by certain restrictions. A court of equity cannot take cognizance of every action for goods, wares, or merchandise sold and delivered, or of money advanced, where

¹ This deficiency in the common law action is now remedied in some States by statute; such is the case (for example) in Pennsylvania and Massachusetts. In England, the Common Law Procedure Act of 1854 has not affected the jurisdiction of the court of chancery upon this subject. *Croskey v. European and American Steam Shipping Co.*, 1 Johns. & H. 108; *Shepard v. Brown*, 4 Giff. 208.

² Spence Eq. 649.

³ 13 Edw. I., st. 1, c. 23; 25 Edw. III., st. 5, c. 5; 38 Edw. I., st. 1, c. 11; 3 & 4 Anne, c. 16.

⁴ See *Long v. Majestre*, 1 Johns. Ch. 305; *Dubourg de St. Colombe's Heirs v. United States*, 7 Peters, 625; *Hickman v. Stout*, 2 Leigh, 6; *Power v. Reeder*, 9 Dana, 6; *Hay v. Marshall*, 3 Hump. 623; *Kirkman v. Vanlier*, 7 Alab. 217.

⁵ Adams's Doct. of Equity, 225.

partial payments have been made, or of every contract, express or implied, consisting of various items, in which different sums of money have become due, and different payments have been made.¹

Again, a naked right of set-off will not be a sufficient ground for a bill for an account. The nature of a set-off has been already explained, and it will be sufficient to refer to the explanation there given.²

Now this right is entirely different from the right to an account, where the demands are not of a distinct and independent character, but are connected in such a way that the whole series forms one transaction.³

It has, however, been pointed out in a former chapter that courts of equity will entertain jurisdiction in certain cases of set-off. Bills in such cases bear some small resemblance to bills for an account, but they should not be confounded with the technical bill for an account. Where the receipts or payments or both are all on one side, a bill for an account will not lie.

484. While the jurisdiction of courts of chancery in matters of account is limited by the considerations above stated, and perhaps by others, it is, nevertheless, difficult to draw the line with absolute precision.⁴ It may, however, be affirmed that in all cases in which an action of account would be a proper remedy at law, the jurisdiction of a court of equity is undoubted;⁵ and that this jurisdiction will extend, moreover, to all cases of mutual accounts, and also to cases in which the accounts are all on one side, but are very complicated and intricate, although such accounts would not be cognizable in the common law action, as not existing between those parties by and against whom account render will lie.

The jurisdiction of the chancellor, therefore, as thus explained, will cover the entire ground occupied by the common law courts

¹ *Fowle v. Lawrason*, 5 Peters, 502.

² *Ante*, p. 305, and note.

³ See *Ranger v. Great Western Railway Co.*, 5 H. L. Cas. 91.

⁴ *Fowle v. Lawrason*, 5 Pet. 495; *Seymour v. Dock Co.*, 5 C. E. Green, 407.

⁵ *Fowle v. Lowrason*, 5 Pet. 495; *Mit-*

chell v. Manufac. Co., 2 Story, 648;

Post v. Kimberly, 9 Johns. 470; *Jones v.*

Bullock, 2 Dev. Ch. 368; *Nelson v. Al-*

len, 1 Yerg. 360; *Bruce v. Burdet*, 1 J. J.

Marsh. 80; *Wilson v. Mallett*, 4 Sand. S.

C. 112.

in the action of account render, and will embrace, besides, a very wide field to which the common law action did not extend.

The jurisdiction in equity depending not so much on the absence of the common law remedy as upon its inadequacy, its exercise is a matter in the discretion of the court; in other words, the court will take upon itself to say whether the common law remedy is, under the circumstances of the case, and in view of the conduct of the parties, sufficient for the purposes of complete justice, or whether the interference of the court of chancery may be properly called for and beneficially applied.¹

Moreover, where there is a duty to render an account, *e. g.* on the part of an agent or steward, and discovery is required, a bill will lie.²

A bill in equity will not ordinarily lie on behalf of an agent against his principal, where the ground for invoking the jurisdiction is *discovery*, for it is the duty of the agent, and not that of the principal, to keep the accounts.³ But where the accounts are mutual, or there is such a complication as to render the interference of a court of equity necessary; or where the nature of the employment (as, for example, that of a steward) is such that money is often paid in confidence without vouchers, such a bill will lie.⁴

The necessity for a discovery will sometimes sustain a bill for an account; and the expediency of preventing a multiplicity of suits has also been considered as one of the reasons for the existence of the equitable remedy.⁵

485. It has been already observed that where an account has been settled between the parties, and a balance struck, the

¹ See *North Eastern Railway Co. v. Martin*, 2 Phillips, 758; *South Eastern Railway Co. v. Brogden*, 3 MacN. & G. 23; *Foley v. Hill*, 2 H. L. Cas. 28; *Anderson v. Noble*, 1 Drew. 143; *Bliss v. Smith*, 34 Beav. 508; *Pike v. Dickinson*, L. R. 7 Ch. App. 61. As to the degree of complication which is necessary to give a court of equity jurisdiction independently of any other circumstance, see *O'Connor v. Spaight*, 1 Sch. & Lef. 305.

² *Adams's Doct. of Eq.* 221.

³ *Wilson v. Mallett*, 4 Sanf. S. C. 112; *Smith v. Leveaux*, 2 De G. J. & Sm. 1.

⁴ See *Smith v. Leveaux*, 2 De G. J. & Sm. 1; *Dinwiddie v. Bailey*, 6 Ves. 136; *Allison v. Herring*, 9 Sim. 583; *Ludlow v. Simond*, 2 C. C. E. 1, 39, 53; *Kerr v. The Steamboat Co.*, 1 Cheves (2d part), 189.

⁵ See *Armstrong v. Gillchrist*, 2 Johns. Ch. 424; *Rathbone v. Warren*, 10 Johns. 587; *King v. Baldwin*, 17 *Id.* 384; *Story's Eq.*, § 456; *Daniel's Ch. Prac.* 576.

remedy by a common law action is entirely adequate, and there is, therefore, no occasion for the exercise of the equitable remedy. It necessarily follows that a plea of stated account will be a bar to a bill for an account. The plea is good as to discovery as well as to relief. In referring such a case to a master it is usual to direct that if he finds any account stated he shall not disturb it.¹

What will constitute a stated account is sometimes a difficult question, and depends, as a general rule, upon the circumstances of the particular case. It is not necessary that the account, alleged to be a stated account, should be signed by the parties. Acquiescence may be proved by other evidence; and sometimes is presumed from conduct. Keeping an account for a length of time without objection, may justify a presumption of acquiescence.² But such delay is only one of many elements to be taken into consideration; and the presumption to which it gives rise is liable to be rebutted.³

486. A stated account may be re-opened for fraud, or for error in particular items. In such cases the court will sometimes direct the whole account to be re-opened;⁴ in other cases, the complainant will be granted leave to surcharge and falsify.⁵

To surcharge is to show that a proper credit has been omitted; to falsify is to show that an improper charge has been inserted.⁶ For the purpose of surcharging or falsifying an account, the erroneous items must be specified in the pleadings. Hence where there is a mere bill for an account, in which no specific errors are pointed out, and a plea of a stated account is put in,

¹ *Weed v. Smull*, 7 Paige, 573; *Bullock v. Boyd*, 2 Edw. Ch. 293; *Dial's Exrs. v. Rogers*, 4 Desaus. 175; *Adams's Doct. of Eq.* 226.

² *Daniel's Chan. Prac.* 690; *Irvine v. Young*, 1 Sim. & Stu. 333; *Willis v. Jernegan*, 2 Atk. 251; *Sherman v. Sherman*, 2 Vern. 276; *Tickel v. Short*, 2 Ves. Sr. 239; *Thompson v. Fisher*, 1 Harris (Pa.), 313; *Porter v. Patterson*, 3 *Id.* 229; *Beers v. Reynolds*, 12 Barb. 288; *Dows v. Durfee*, 10 *Id.* 213; *Coopwood v. Bolton*, 26 Miss. 212; *Brown v. Vandyke*, 4 Halst.

Ch. 795; *Ogden v. Astor*, 4 Sand. S. C. 311; *Lupton v. Janey*, 13 Peters, 381.

³ See *Williams v. Savage Manufac. Co.*, 1 Maryl. Ch. 303.

⁴ See *Bankhead v. Alloway*, 6 Cold. 56.

⁵ *Slee v. Bloom*, 5 Johns. Ch. 366; 20 Johns. 669; *Barrow v. Rhineland*, 1 Johns. Ch. 550; *Johnson's Exrs. v. Ketchum*, 3 Green Ch. 364; *Botifour v. Weyman*, 1 McCord Ch. 156; *Lee's Admrs. v. Reed*, 4 Dana, 109; *Roberts v. Totten*, 8 Eng. 609.

⁶ *Pit v. Cholmondeley*, 2 Ves. Sr. 565

the complainant must amend his bill, and charge either fraud or particular errors. If, however, the bill in the first instance points out particular errors, these must be denied by averments in the plea, as well as by answer in support of the plea.¹

In this country the account can only be opened in the items specifically pointed out;² but in England the doctrine has been pushed to the extent of holding that where an account has been surcharged and falsified in one or more items, the complainants can then go on and surcharge and falsify it at large.

A bill to impeach an account must be filed in a reasonable time.³

487. The jurisdiction of courts of chancery in cases of Partition owes its origin to the inadequacy of the remedies which the common law afforded to joint owners who were desirous of severing the joint ownership. This jurisdiction was assumed some time about the reign of Elizabeth;⁴ and became so well established both in England and in the United States, that to invoke this equitable remedy has become a matter of right and not of mere grace.⁵

It is well known that at common law the writ of partition

¹ Daniel's Chan. Prac. 374, 691.

1 McCord Ch. 156; Ogden v. Astor, 4 Sandf. S. C. 311.

² See Chappedelaine v. Dechenaux, 4 Cranch, 306; Consequa v. Fanning, 3 Johns. Ch. 587; Nourse v. Prime, 7 Id. 69; Philips v. Belden, 2 Edw. Ch. 1; Troup v. Haight, Hopk. Ch. 539; Bullock v. Boyd, 1 Hoff. Ch. 294; Redman v. Green, 3 Ired. Eq. 54; Gover v. Hall, 8 Har. & J. 43; Lilly v. Kroesen, 3 Maryl. Ch. 83; Williams v. The Savage Manufac. Co., 1 Id. 306; Freeland v. Cocke, 8 Munf. 352; Compton v. Greer, 2 Dev. Ch. 93.

⁴ 1 Spence Eq. 654.

³ Lupton v. Janey, 13 Peters, 381; Baker v. Biddle, Baldwin C. C. R. 418; Ellison v. Moffat, 1 Johns. Ch. 46; Mooers v. White, 6 Id. 360, 370; Dexter v. Arnold, 2 Sumner, 108; Bolling v. Bolling, 5 Munf. 334; Randolph v. Randolph, 2 Call. 537; Gregory's Exrs. v. Forrester, 1 McCord Ch. 318; Exrs. of Radcliffe v. Wightman, Id. 408; Hutchins v. Hope, 7 Gill, 119; Chesson v. Chesson, 8 Ired. Eq. 141. See, also, Botifneur v. Weyman,

⁵ See Baring v. Nash, 1 V. & B. 552; Parker v. Gerard, Amb. 236; Wood v. Little, 35 Maine, 107; Hanson v. Willard, 12 Id. 142; Bailey v. Sisson, 1 R. Island, 233; Wiseley v. Findlay, 3 Rand. 361; Castleman v. Veitch, Id. 598; Otley v. McAlpine's Heirs, 2 Gratt. 340; Allen v. Barkley, 1 Speer Eq. 264; Oldhams v. Jones, 5 B. Mon. 458; Holmes v. Holmes, 2 Jon. Eq. 334; Wright v. Marsh, 2 Greene (Iowa), 94; Howey v. Goings, 13 Ill. 95; Donnell v. Mateer, 7 Ired. Eq. 94. But in Georgia it would seem that a bill for partition in equity will be entertained only when some peculiar circumstances exist which render the common law remedy inadequate; Boggs v. Chambers, 9 Georgia, 1; Rutherford v. Jones, 14 Id. 521.

existed only where the joint ownership arose by operation of the law ; and was therefore confined to the single case of tenancy in co-parcenary. As the law created that tenancy, it was thought reasonable that the law should also furnish the means for its severance. By statutes of 31 Henry VIII., c. 1, and 32 *Id.* c. 32, the remedy was extended to the cases of joint tenants and tenants in common. The partition of copyhold lands was effected by a plaint in the Lord's court in the nature of a writ of partition.¹

488. The principal disadvantages of the common law action were two. In the first place only the parties in possession could be bound by the judgment, and consequently estates in remainder or contingency were not and could not be affected thereby. In the second place, as the judgment was for a division according to the titles proved, it was incumbent upon the complainant to prove the defendants' titles as well as his own, which was usually difficult, and sometimes impossible, to do. Moreover, the judgment of a common law court could not be conveniently moulded to meet the exigencies of each particular case.

In consequence of these disadvantages, and of the superiority of the equitable remedy, the writ of partition and the plaint were abolished by statute.²

In nearly all of the United States the partition of real property is the subject of express statutory enactments. In some States the remedy is by petition, the common law writ, in many of them, existing concurrently.³ In others, the common law action has been freed from its disadvantages, and rendered more effective and available.⁴ Partition of decedents' estates is also effected in some States by probate courts and similar tribunals. In many of the States, however, the remedy by bill in equity also prevails, and from its many advantages must continue to be a favorite method of effecting a division of real property between joint-owners.

489. For in equity the disadvantages which were attendant upon the common law action do not exist.⁵ Persons who have

¹ Adams's Doct. Eq. 229, 230.

² 3 & 4 Wil. IV., c. 27, § 36.

³ See 1 Wash. on Real Prop. 433.

⁴ See *Smith v. Smith*, 10 Paige, 470.

⁵ The advantages of an equitable parti-

tion are summed up by Chancellor Zabris-
kie in *Hall v. Piddock*, 6 C. E. Green,
314, in the following language ; " The
peculiarities of an equitable partition are,
that such part of the land as may be more

limited estates may become parties to a bill for partition, and the estates of such parties only may be divided; or, if it is deemed desirable, the parties in remainder or reversion may be brought in, and the decree will then be binding upon them, and the whole estate may be divided.¹ Interests of infants or of persons not *in esse* may also be bound.²

In proceedings for partition in equity it is not necessary that the complainant should set forth the defendant's title; indeed discovery as to this title is frequently a part of the relief which the complainant desires, and to which he is entitled, and if necessary, the reference to the master will direct that the defendant's title be ascertained.³ The complainant, however, must show his own title; otherwise the bill will be dismissed.⁴ And he must show that the connection between his title and that of the defendant is such as to entitle him to a partition as against the latter.⁵ A bill for a partition cannot be made the means of trying a disputed title;⁶ although it seems that a question as to title may be decided by the court with the consent of the parties.⁷ Unless the title is undisputed, the bill must be dismissed,

advantageous to any party on account of its proximity to his other land, or for any other reason, will be directed to be set off to him if it can be done without injury to the others; that when the lands are in several parcels each joint owner is not entitled to a share of each parcel, but only to his equal share in the whole; that where a partition exactly equal cannot be made without injury, a gross sum or yearly rent may be directed to be paid for owelty or equality of partition by one whose share is too large to others whose shares are too small; and that when one joint-owner has put improvements on the property, he shall receive compensation for his improvements, either by having the part on which the improvements are assigned to him at the value of the land without the improvements, or by compensation directed to be made for them." In this case an injunction was granted in a bill for partition in equity to restrain

similar proceedings at law, which had been previously instituted, solely on the ground of the superiority of the equitable over the common law method as a means of effecting a just division among the parties. See also *Donnell v. Mateer*, 7 Ired. Eq. 94.

¹ *Gaskell v. Gaskell*, 6 Sim. 643; notes to *Agar v. Fairfax*, 2 Lead. Cas. Eq. 468 (4th Eng. ed.).

² *Wills v. Slade*, 6 Ves. 498; *Gaskell v. Gaskell*, 6 Sim. 643.

³ *Jope v. Morshead*, 6 Beav. 213; *Agar v. Fairfax*, 17 Ves. 533.

⁴ *Parker v. Gerard*, Amb. 236; *Jope v. Morshead*, 6 Beav. 213.

⁵ *Ramsay v. Bell*, 8 Ired. Eq. 209.

⁶ *Slade v. Barlow*, L. R. 7 Eq. 296; *Potter v. Waller*, 2 De G. & Sm. 410; *Giffard v. Williams*, L. R. 5 Ch. App. 546; *Bolton v. Bolton*, L. R. 7 Eq. 298, n.

⁷ *Burt v. Hellyar*, L. R. 14 Eq. 160.

or else retained until the title has been settled at law.¹ But this rule applies only to disputes as to legal titles; and where the dispute involves an equitable element, the court has jurisdiction over the whole matter.²

Partition may be had of an equitable estate;³ or of an incorporeal hereditament.⁴

All persons entitled to, or claiming an interest in the land, whether legal or equitable, are proper parties to a bill for partition. It is only, however, by a person entitled in possession that a bill for partition can be filed; although, as was stated above, the owners of expectant estates may be made parties, and their interests will be bound. Therefore a bill cannot be maintained by a joint tenant, or tenant in common, in remainder, or reversion. Nor can he, after he has filed his bill, put himself in a better position, by acquiring a title in possession and amending his bill.⁵

The owners of an estate subject to a mortgage may have partition in equity; in which case the equity of redemption only is divided.⁶

Judgment creditors and mortgagees of tenants in common are not proper parties to a bill for partition;⁷ although it has been decided in England that a mortgagee of an undivided share *may*

¹ *Castleman v. Veitch*, 3 Rand. 598; 459; *Adams's Doct. Eq.* 458, note (6th Straughan v. Wright, 4 *Id.* 493; *Smith v. Am. ed.*).

Smith, 10 Paige, 470; *Steedman v. Weeks*, 2 Strob. Eq. 145; *Albergott v. Chaplin*, 10 Rich. Eq. 428; *Pell v. Ball*, 1 *Id.* 361; *Collins v. Dickinson*, 1 Hay, 240; *Davis v. Davis*, 2 Ired. Ch. 607; *Wilkin v. Wilkin*, 1 Johns. Ch. 111; *Manners v. Manners*, 1 Green Ch. 384; *Garrett v. White*, 3 Ired. Ch. 131; *Bruton v. Rutland*, 3 Humph. 435; *Foust v. Moorman*, 2 Carter, 17; *Boone v. Boone*, 8 Maryl. Ch. 497; *Corbitt v. Corbitt*, 1 Jones Eq. 114; *Walker v. Laffin*, 26 Ill. 472; *Williams v. Wiggand*, 53 *Id.* 233; *Gourley v. Woodbury*, 43 Verm. 89; *Hassam v. Day*, 39 Miss. 392; *Dewitt v. Ackerman*, 2 C. E. Green, 215; but see, *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169; *Morenhout v. Higuera*, 32 Cal. 289; *Bollo v. Navarro*, 33 *Id.*

² *Donnell v. Mateer*, 7 Ired. Eq. 94; *Foust v. Moorman*, 2 Carter, 17; *Carter v. Taylor*, 3 Head. 30; *Leverton v. Waters*, 7 Cold. 20.

³ *Hitchcock v. Skinner*, 1 Hoff. Ch. 21.

⁴ *Bailey v. Sisson*, 1 R. Island, 233.

⁵ *Evans v. Bagshaw*, L. R. 8 Eq. 469; L. R. 5 Ch. App. 340.

⁶ *Wotton v. Copeland*, 7 Johns. Ch. 140.

⁷ *Sebring v. Mersereau*, 9 Cowen, 344; *Harwood v. Kirby*, 1 Paige, 469; *Low v. Holmes*, 2 C. E. Green, 148; *Speer v. Speer*, 1 McCart. 240; *Thruston v. Minke*, 32 Maryl. 571. Though a mortgagee may be joined when it is necessary for the protection of his interests; *Whitton v. Whitton*, 38 N. Hamp. 135.

maintain a bill for foreclosure and partition.¹ Where the defendants are desirous that there shall be no partition of their several shares, the partition may be confined to the aliquot share of the complainant.²

490. The method of making a partition in equity is by first ascertaining the rights of the several persons interested, and then issuing a commission to make the partition required. If the proportions to which the different parties are entitled appear upon the pleadings, no reference to a master to ascertain them is necessary; otherwise, such a reference will be ordered.³ The interlocutory decree directing such inquiries generally goes on to order a partition to take place.⁴ After the return of the commission, and the confirmation thereof by the court, the partition is finally completed by mutual conveyances of the allotments made, to the several parties.⁵ Sometimes, instead of ordering a commission, the court may make a declaration that the estate ought to be divided, with liberty to the parties interested therein to bring before the judge at chambers proposals for a partition.⁶

In England, the court, in same cases, instead of directing conveyances of the several shares, has declared each of the parties trustees as to the shares allotted to the others of them, and then vested the whole trust estate in a single new trustee, under the Trustee Act, with directions to convey to the several parties their allotted shares.⁷ Under the same act an infant may be declared trustee of such portions of the property as were allotted to the other parties. Before that act, where the legal estate to a portion was vested in an infant, the conveyances were respited until he came of age, and a day given to him to show cause against the decree.⁸ In some of the United States, the decree has, either by statute or by judicial decision, the effect of vesting the titles of the different purparts in the persons respectively entitled thereto, without the necessity of a conveyance.⁹

¹ *Fall v. Elkins*, 9 Week. Rep. 861.
See *Watkins v. Williams*, 3 MacN. & G. 622.

² *Hobson v. Sherwood*, 4 Beav. 184.

³ *Daniel's Chan. Prac.* 1121.

⁴ *Id.* 1123.

⁵ *Id.* 1122.

⁶ *Clarke v. Clayton*, 2 Giff. 333.

⁷ *Shepherd v. Churchill*, 25 Beav. 21.

⁸ *House v. Falconer*, 4 Desaus. 86; notes to *Agar v. Fairfax*, 2 Lead. Cas. Eq. 474 (4th Eng. ed.).

⁹ See *Griffith v. Phillips*, 3 Grant's Cas. 381.

491. The inconvenience or difficulty of making the partition is no objection to a decree. Thus a single house may be ordered to be divided; and in one case, at least, this division is said to have been actually effected by building up a wall in the middle of the house.¹ It need scarcely be said, however, that the court will, as a general rule, make such a partition as will best preserve the value of the property; and that such an extreme measure as the actual division of a house would not be resorted to, if a fair partition could be made in any other way.² Thus, if there were three houses to be divided among three, it would not be right to divide every house, for that would be to spoil every house; but some recompense is to be made either by sum of money, or rent for owelty of partition, to those who have the houses of less value.³ Moreover, in dividing real estate the convenience of the different parties in interest should be consulted. Thus, if one of the parties has property to which one of the allotments is contiguous, and there is another allotment not contiguous, that would be a good ground, *cæteris paribus*, for allotting that particular portion to the individual to whom it is much more convenient to have it than the other.⁴ A mill or an advowson may be divided by giving to the parties every alternate toll dish or turn of the church, as is done in the common law writ.⁵

492. Courts of equity have power to award owelty in partition, which is a sum of money or a rent given for the purpose of equalizing the shares.⁶ For the same purpose one purpart may be charged with a servitude or easement for the benefit of another.⁷ This owelty could not have been granted in the common law writ, although statutes in some States now authorize it in such actions. Besides awarding owelty, a court of chancery will do complete justice between the parties by ordering an account where one joint owner appears to have received more

¹ *Turner v. Morgan*, 8 Ves. 143; notes to *Agar v. Fairfax*, 2 Lead. Cas. Eq. 470 (4th Eng. ed.).

² *Daniel's Chan. Prac.* 1130.

³ See *Earl of Clarendon v. Hornby*, 1 P. Wms. 446.

⁴ *Canning v. Canning*, 2 Drew. 436.

⁵ *Dan. Ch. Prac.* 1131.

⁶ *Smith v. Smith*, 10 Paige, 470; 17.

Phelps v. Green, 3 Johns. Ch. 302;

Graydon v. Graydon, 1 McMul. Eq. 63;

Haywood v. Judson, 4 Barb. S. C. 228;

Warfield v. Warfield, 5 Har. & J. 459;

Wynne v. Tunstall, 1 Dev. Ch. 23; *Cox*

v. McMullin, 14 Grat. 82; *Norwood v.*

Norwood, 4 Har. & J. 112.

⁷ *Cheswell v. Chapman*, 38 N. Hamp.

than his share of the rents and profits;¹ and, in proper cases, by decreeing an allowance for money expended in improvements.²

493. One disadvantage under which proceedings for partition in equity labored, was the want of power in the court to order a sale of the property. It is true that a sale might have been ordered if all the parties who were *sui juris* desired it; and this, although some of the parties were infants, provided it appeared that it would be advantageous for the infant that a sale should take place. But if one of the parties *sui juris* objected, no sale could take place. This difficulty was in England obviated by a statute passed in 1868, by which a very useful power was conferred upon the court to order sales in certain cases.³

In most of the United States, the courts of equity have power to order a sale in partition.⁴ Specific performance of an *agreement* to divide real estate will be enforced in chancery; and this was so as to copyhold lands even prior to the passage of the statute extending the chancery jurisdiction in partition to estates of that tenure.⁵

494. Dower is the right of a married woman to have assigned to her after the death of her husband one-third of the land of which he was seized in fee simple or fee tail at any time during coverture, and which his issue, if any, might have inherited; and to enjoy the land thus assigned to her for life.

This right accrues immediately upon the death of the husband; but the widow cannot enter upon any specific part of the real estate until the dower has been assigned.⁶ It is the duty of

¹ *Rozier v. Griffith*, 31 Missouri, 171; *6 C. E. Green*, 314; *Respass v. Brecken-Leach v. Beattie*, 33 Verm. 195; *Early v. Friend*, 16 Grat. 21; *Hitchcock v. Skinner*, 1 Hoff. Ch. 21; *Backler v. Farrow*, 2 Hill Ch. 111; *Carter v. Carter*, 5 Munf. 108.

² *Swan v. Swan*, 8 Price, 518; *Town v. Needham*, 3 Paige, 553; *St. Felix v. Rankin*, 3 Edw. Ch. 323; *Conklin v. Conklin*, 3 Sandf. Ch. 64; *Green v. Putnam*, 1 Barb. S. C. 500; *Brookfield v. Williams*, 1 Green's Ch. 341; *Obert v. Obert*, 1 Halst. Ch. 397; *Doughady v. Crowell*, 3 Stockt. 201; *Hall v. Piddock*, 6 C. E. Green, 314; *Respass v. Breckenridge*, 2 A. K. Marsh. 581; *Louvalle v. Menard*, 1 Gilm. 39; *Sneed v. Atherton*, 6 Dana, 276; *Borah v. Archers*, 7 *Id.* 176; *Dean v. O'Meara*, 47 Ill. 120.

³ 31 & 32 Vic., c. 40. See notes to *Agar v. Fairfax*, 2 Lead. Cas. Eq. 477 (4th Eng. ed.).

⁴ See American note to *Agar v. Fairfax*, 2 Lead. Cas. Eq. 648 (3d Am. ed.).

⁵ See 2 Lead. Cas. Eq. 468 (4th Eng. ed.).

⁶ In some of the United States the widow has the right, by statute, to hold

the heir to make the assignment of dower. No writing for this purpose was necessary; a parol assignment, if accepted by the widow, was good.

495. In case the heir neglected or refused to assign the dower, the widow had her remedy at common law, by the writ of right of dower, and by the writ of dower *unde nihil habet*;¹ but in addition to these, the remedy by bill in equity was invoked at a very early period. The first exercise of this jurisdiction of the chancellor to assign dower appears to have occurred in the reign of Elizabeth; but for many years the reported cases were not numerous, and there appears to have been much doubt as to the grounds upon which this jurisdiction was assumed.² The relief was at one time considered to be of an auxiliary character. Thus, as the title papers of an estate were in the hands of the heir, it was frequently necessary for the widow to have access to them, or, at all events, to be informed of their contents, in order to a full knowledge of her rights. This end was accomplished by a bill of discovery, which was entertained for the purpose of enabling the widow subsequently to assert her right at law. Bills were also entertained for the purpose of removing impediments in the way of the wife's legal action; and the jurisdiction thus acquired was, upon the familiar principles of equity, extended to afford complete relief.³ The jurisdiction, however, was not assumed without hesitation; and in two early cases the bills were dismissed because there was no impediment in the way of the complainant's proceeding at law.⁴ The scruples against exercising this jurisdiction were, however, eventually overcome in consequence of the many excellent reasons which existed in its favor. These reasons were the disadvantages under which the common law remedies labored—the fact that in some

and enjoy the mansion house until her dower is assigned to her. It will be remembered, also, that by Magna Charta the widow had a right to remain in the mansion house for forty days after her husband's death. This was called the widow's quarantine. Similar provisions in favor of the widow are found in the statute books of most of the States. See 4 Kent's Com. 62.

¹ The common law action in a large number of the United States answers most nearly to this writ. 4 Kent's Com. 70.

² 2 Scrib. on Dower, 134.

³ *Id.*

⁴ *Shute v. Shute*, Prec. Ch. 111; *Wallis v. Everard*, 3 Ch. Rep. 161; 2 Scribner on Dower, 135.

cases the right to dower was recognized solely in courts of equity, and the prevention of multiplicity of suits.

Such reasons for the exercise of chancery jurisdiction in cases of dower existed in this country as well as in England; and we accordingly find the courts in the United States entertaining bills for dower at an early date.¹ It was, indeed, at one time doubted in New Jersey whether the common law courts did not possess exclusive jurisdiction upon the subject of dower;² but this doubt has now been settled in favor of the court of chancery, and the concurrent jurisdiction of that tribunal with the common law courts fully established.³

Indeed, it may be said in the language of Chancellor Kent, that "the jurisdiction of chancery over the claim of dower has been thoroughly examined, clearly asserted, and definitively established."⁴

496. The disadvantages of the common law procedure were numerous. In addition to the circumstance that no discovery could be had and no account taken, there was, moreover, the inability to recover damages, a defect which enabled the heir, by refusing to assign dower, to enjoy all the mesne profits until judgment was actually recovered by the widow.⁵ This defect, indeed, was remedied, so far as the writ of dower *unde nihil habet* was concerned, by the statute of Merton,⁶ by which it was provided that the heir should yield damages from the death of the husband to the date of the judgment. But this statute did not apply to the writ of right of dower; and even the writ of dower *unde nihil habet* did not furnish relief in all cases, because, by the language of the statute, recovery could only be had where the husband died seized.⁷ If, therefore, the husband had aliened, during his lifetime, no damages could be recovered against his alienee.⁸

497. In equity, as has been already stated, discovery could be

¹ Hazen v. Thurber, 4 Johns. Ch. 604; Swaine v. Perine, 5 Id. 482; Badgley v. Bruce, 4 Paige, 98; 2 Scribner on Dower, 142.

² Harrison v. Eldridge, 2 Halst. 392.

³ Hartshorne v. Hartshorne, 1 Green Ch. 349; 2 Scribner on Dower, 143.

⁴ 4 Kent's Com. 71.

⁵ 2 Scribner on Dower, 656.

⁶ 20 Hen. III., c. 1. See 1 Washburn on Real Prop. 231, 232.

⁷ 2 Scribner on Dower, 656.

⁸ Whether damages could be recovered against the alienee in the case of a demand being made, seems to be doubtful. 2 Scribner on Dower, 666.

had of all things which were necessary to ascertain the widow's right of dower and the extent thereof; and moreover, if any difficulty or impediment existed in the way of the assertion of her legal right, the court of chancery might interpose to remove it.

498. To what extent the court of chancery would give an account of the *mesne* profits, seems to be a disputed question in England. It has been contended, on the one hand, that in giving damages, courts of equity are not confined by the terms of the statute of Merton, but award the same independently of the provisions of that statute, and, consequently, in cases to which that statute does not extend.¹ On the other hand, it is said that the power of the chancellor is regulated by that statute, and that damages are not given as against the alienee of the husband.²

In America it has been stated by high authority that in equity the course is universally to give the widow an account of the rents and profits from the death of the husband;³ and similar decisions have been made in several States.⁴

But in other States a different conclusion has been reached.⁵

Whatever the rule on this subject may be, the superior facilities which courts of equity have for ascertaining the rents and profits, and taking an account, must be considered as one of the reasons for their assumption of jurisdiction in cases of dower.

Moreover, there are some cases in which equity will undoubtedly give damages, although a court of law would not. At law, if the tenant died after judgment, and before damages were assessed, the widow lost her damages; and if the widow died before damages were assessed, her representatives could not claim them. But a court of equity will, in such cases, give relief.⁶

¹ *Curtis v. Curtis*, 2 Bro. C. C. 620; 1 Roper Husb. and Wife, 453, 454.

² *Mundy v. Mundy*, 2 Ves., Jr. 122; 4 Bro. C. C. 294; 1 Roper Husb. and Wife, 454, note; 2 Scribner on Dower, 685, 686.

³ *Chase's Case*, 1 Bland Ch. 206. See, also, *Wells v. Beall*, 2 Gill & J. 468; *Darnall v. Hill*, 12 *Id.* 388.

⁴ *Keith v. Trapier*, 1 Bailey (Eq.), 68; *Heyward v. Cuthbert*, 1 McCord, 386; *Turner v. Morris*, 27 Miss. 733.

⁵ *Tod v. Baylor*, 4 Leigh, 498; *Kendall v. Honey*, 5 Mon. 282; *Golden v. Maupin*, 2 J. J. Marsh. 236. See 2 Scribner on Dower, 687, 692, where the authorities are examined.

⁶ *Story's Eq. Jurisp.*, § 625.

499. By proceedings in equity, moreover, a multiplicity of suits is frequently prevented.

Thus, it sometimes happens, that, before obtaining an assignment of dower, it is necessary that a term of years should be got out of the way as a satisfied term,¹ or a fraudulent conveyance set aside,² or conflicting rights to the subject matter of the bill settled.³

This preliminary relief, as well as the assignment of dower itself, can be obtained in equity in one suit, to which all those who are interested may be made parties, and thus all rights and interests may be settled by a decree. Other illustrations of this double relief may be found in those cases in which bills have been filed by widows to redeem encumbered estates, and for dower therein.⁴

500. Another reason for the assumption by the court of chancery of jurisdiction in matters of dower, was the fact that in some cases the title of the husband to the property, and consequently that of the widow to her dower therein, was cognizable solely in equity, and there was, therefore, a complete failure of justice in courts of law. Such was the case when dower was claimed out of equitable estates, and out of equities of redemption, and in some other instances. In such cases the jurisdiction of courts of equity, in the assignment of dower, is exclusive.

It is true that in England prior to the statute of 3 & 4 Wil. IV., c. 105, dower could not have been claimed out of equitable estates, and, therefore, as equity follows the law, a court of chancery would not allow a claim for dower where a *legal* right thereto could not have been established. But in this country, the general rule is, perhaps, the other way, and dower is allowed out of equitable estates. The consequence is, that as these estates

¹ See remarks of Lord Hardwicke in *Dormer v. Fortescue*, 3 Atk. 130.

² *Swaine v. Perine*, 5 Johns. Ch. 482; *London v. London*, 1 Humph. 1; *Davis v. Davis*, 5 Missouri, 183; *Tate v. Tate*, 1 Dev. & Bat. Eq. 22; *Petty v. Petty*, 4 B. Mon. 215.

³ *Goodburn v. Stevens*, 1 Maryl. Ch. Dec. 420; 5 Gill, 1.

⁴ *Farwell v. Cotting*, 8 Allen, 211; *Strong v. Converse*, *Id.* 557; *Chiswell v. Morris*, 1 McCart. 101; *Eldridge v. Eldridge*, *Id.* 195; *Mantz v. Buchanan*, 1 Maryl. Ch. Dec. 202; *Scribner on Dower*, vol. i., chap. xxiii.

are recognized only in courts of chancery, it is in such courts only that the right of dower in these estates can be enforced, and the jurisdiction of courts of chancery is in such cases exclusive.¹

Prior to the statute of William IV., above cited, equities of redemption fell under the same rule as ordinary equitable estates, so far as the right of dower was concerned. In this country, however, the mortgagor is generally, perhaps universally, regarded as invested with the legal fee, and dower may be claimed by his widow both by action at law and by bill in equity, as against all persons except the mortgagee and those claiming under him. As against them her only remedy is by bill in equity.²

Other cases also may arise in which the right to dower is controlled by equitable considerations. Thus in equity lands used for partnership purposes are considered as personalty, and the widow's claim for dower must be postponed until the affairs of the firm are settled. The consequence is, that if the settlement is improperly delayed, the widow may file a bill for the adjustment of the business of the concern, and the assignment of her dower.³ So, also, the widow of a purchaser of real estate, on which the purchase-money has been but partially paid, may file a bill to compel her husband's representatives to complete the purchase, and even to sell the land for that purpose, and allow her a proportionate part of the surplus as her dower.⁴

So, also, where estates out of which widows are entitled to dower are sold by order of court, or are so sold as to give courts of equity jurisdiction over the money, these courts will entertain jurisdiction of the widow's claim for dower out of the fund.⁵

501. From the above sketch of the grounds upon which the jurisdiction of courts of equity in bills for dower is founded, the general conclusion may be reached that these courts have concurrent jurisdiction with courts of law in all cases, and that no

¹ *McMahan v. Kimball*, 3 Blackf. 1; 2 Ch. 101; *Eldridge v. Eldridge*, *Id.* 195; *Scribner on Dower*, 151.

² See *Gibson v. Crehore*, 3 Pick. 475; 1 Wash. on Real Prop. 246; *Farwell v. Coting*, 8 Allen, 211; *Strong v. Converse*, *Id.* 557; *Chiswell v. Morris*, 1 McCart. 51; *Goodburn v. Stevens*, 1 Maryl. Ch. Dec. 420; 5 Gill, 1.

³ *Thompson v. Cochran*, 7 Humph. 72; *Daniell v. Leitch*, 13 Grat. 195.

⁴ 1 Washburn on Real Prop. 245.

⁵ 1 Washburn on Real Prop. 245.

special difficulty in the way of enforcing the right at common law need exist, in order to invoke the jurisdiction of the chancellor.¹ The point appears to have arisen in *Mundy v. Mundy*,² where a demurrer to a bill for dower was overruled, although the bill contained no allegation that there was any impediment to the complainant's remedy in an action at law. But while the jurisdiction of courts of equity to assign dower is undoubted; yet it may be laid down as a universal rule, that in cases where the *right* of the widow to dower is controverted, that question must be tried by a jury; and the chancellor will either direct an issue to be framed, or order the bill to be retained until the right shall have been tried at law.³ The practice in this country is said to be to retain the bill for a reasonable time until the right at law is established.⁴ Equity, however, will aid the widow by discovery for the purpose of establishing her right at law.⁵

Ordinarily, in bills for assignment of dower, the defendant is confined to strictly legal matters of defence, as the claim is treated as a *legal* claim; and in several decisions in the United States it has been held (contrary to the English doctrine),⁶ that the plea of a *bonâ fide* purchase for value is no defence, even in a court of equity, against a legal claim for dower.⁷ But in several instances, equitable matters of defence have been allowed to be set up;⁸ and it may be possible that the influence of the modern English authorities upon the effect of pleading a purchase will

¹ See note to *Agar v. Fairfax*, 2 Lead. Cas. Eq. 482 (4th Eng. Ed.).

² 2 Ves., Jr. 122.

³ *Mundy v. Mundy*, 2 Ves., Jr. 122; *D'Arcy v. Blake*, 2 Sch. & Lef. 390; Daniel's Chan. Prac. 1139.

⁴ *Badgley v. Bruce*, 4 Paige, 98; *Swaine v. Perine*, 5 Johns. Ch. 482; *Hartshorne v. Hartshorne*, 1 Green Ch. 349; *Rockwell v. Morgan*, 2 Beas. Ch. 384; *Wells v. Beall*, 2 Gill & J. 468; *Sellman v. Bowen*, 8 Gill & J. 50; 2 Scribner on Dower, 149.

⁵ *Curtis v. Curtis*, 2 Bro. C. C. 620; *D'Arcy v. Blake*, 2 Sch. & Lef. 387.

⁶ In *Gomm v. Parrott*, 3 C. B. (N. S.) 47, it was decided flatly that a demand-

ant in dower is not entitled to inspection of the deed under which the property out of which she claims to be endowed was conveyed away by her husband, as against a *bonâ fide* purchaser for value without notice of the marriage.

⁷ *Snelgrove v. Snelgrove*, 4 Desaus. 288; *Larrowe v. Beam*, 10 Ohio, 498; *Campbell v. Murphy*, 2 Jones Eq. 357; *Ridgeway v. Newbold*, 1 Harring. (Del.) 385; *Gano v. Gilruth*, 4 G. Greene (Iowa), 453; 2 Scribner on Dower, 157.

⁸ See *Ralls v. Hughes*, 1 Dana, 407; *Bullock v. Griffin*, 1 Strob. Eq. 60; *Steiger v. Hillen*, 5 Gill & J. 121; 2 Scribner on Dower, 157, 158.

induce the courts to adopt a different position from that taken in *Snelgrove v. Snelgrove* and the kindred cases cited above.¹

502. The right to dower having been admitted or established, its assignment is effected by means of a reference to a master and a commission, and the share is set out by metes and bounds, and possession ordered to be delivered. When necessary, also, an account will be taken.

If, for any cause, the land out of which the dower is claimed has been turned into money, the widow will be entitled to dower out of the fund. The practice in such cases is not uniform throughout the Union. In some States a gross sum is awarded, in others an annual interest is secured to the complainant.²

In addition to the remedies by the common law writs, and by bill in equity, there are, in many States, summary proceedings in probate courts and courts of similar jurisdiction for the assignment of dower out of the estates of decedents. Proceedings of this nature are necessarily more limited in their scope than the other remedies. They are the subject of express legislation in most of the States.

503. Somewhat analogous to the jurisdiction in cases of partition and dower is that which courts of chancery occasionally assume in cases of disputed boundaries. This jurisdiction is of ancient date, and appears to have met with more favor in the early period of the history of equity jurisprudence than it has

¹ See *Flagg v. Mann*, 2 Sumn. 486. It will be remembered that in the chapter upon Notice (*ante*, p. 269) it was stated that in *Snelgrove v. Snelgrove* and the kindred cases, the courts in some of the States had adopted a rule upon this subject, different from that which at present prevails in England, upon the ground that "a purchaser of an equitable title takes it subject to all prior equities." Not only is this so, but these cases also hold that where the preceding equity is clothed with the legal title (or, in other words, where the simple legal title is asserted) the court on that ground alone ought to lend to the plaintiff its active assistance, and refuse to the defendant

the protection of the plea. "When the plaintiff comes in with a legal title," said Chancellor Desaussure in *Snelgrove v. Snelgrove*, "I do not see how he can be refused the aid of the court." It is evident, however, that the doctrine, as thus stated, ignores the proper effect to be given to the plea of a purchase for value, which is, that as soon as the truth of the plea is established, the character of the defendant's title is not even to be inquired into. See Lord Eldon in *Wallwyn v. Lee*, 9 Ves. 24, and Lord Justice James in *Pilcher v. Rawlins*, L. R. 7 Ch. App. 269; *ante*, p. 268.

² See 2 Scribner on Dower, 160.

done in modern times. The origin of the jurisdiction is a subject as to which there has existed some difference of opinion, Lord Keeper Henley in the leading case of *Wake v. Conyers*¹ ascribing it to the equity of preventing a multiplicity of suits, while Sir William Grant² was of opinion that it grew up in analogy to the old common law writs *De rationalibus divisis* and *De perambulatione faciendâ*, whenever equitable grounds for invoking such a relief existed. The point is of no great practical importance, as the exercise of the jurisdiction in modern times is not of frequent occurrence.

The general rule may now be stated to be that a court of equity has no jurisdiction to fix the boundaries of legal estates unless some equity is superinduced by the act of the parties,³ or unless some particular circumstance of fraud or confusion exists.⁴ Thus where the owner of land broke down the dam, and ploughed up the race way which led from it, so as to render it difficult for the complainant, who was entitled to use both the dam and the race, to ascertain and define their course and situation, it was held that relief was properly sought for in chancery.⁵ And where the settlement of a boundary was necessary, under the circumstances of the case, to prevent a multiplicity of suits, the jurisdiction was sustained.⁶ But a mere confusion of boundaries, without more, will not be enough to sustain a bill.⁷ And the circumstance that the plaintiff has only an equitable title, and that the legal title is outstanding in the hands of trustees, will not be enough to give jurisdiction.⁸

To sustain the bill the plaintiff must show that some portion of the land is in possession of the defendant;⁹ and he must estab-

¹ 2 Lead. Cas. Eq. 433 (4th Eng. ed.). *Mayor of York v. Pilkington*, 1 Atk.

² *Speer v. Crawter*, 2 Meriv. 410.

³ See *Hicks v. Hastings*, 3 K. & J. 701, for an exceptional case.

⁴ *Wake v. Conyers*, 1 Eden, 331; 2 Lead. Cas. Eq. 433 (4th Eng. ed.).

⁵ *Merriman v. Russell*, 2 Jon. Eq. 470.

⁶ *De Veney v. Gallagher*, 5 C. E. Green, 33; *Bute (Marquis) v. Glamorganshire Canal Co.*, 1 Phillips, 681; *Bouverie v. Prentice*, 1 Bro. C. C. 200;

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⁷ See *Norris's Appeal*, 14 P. F. Sm. 275; *Tillmes v. Marsh*, 17 *Id.* 507; *Haskell v. Allen*, 23 Maine, 448; *Doggett v. Hart*, 5 Florida, 215, 232.

⁸ *Stuart's Heirs v. Coalter*, 4 Rand, 74; *Doggett v. Hart*, 5 Florida, 215.

⁹ *Att. Gen. v. Stephens*, 6 De G. M. & G. 111, 149; overruling the Vice-Chancellor in 1 K. & J. 724.

lish by admissions of the defendant, or by evidence, a clear title to some land in the possession of the defendant.¹

504. In several cases in England relief has been afforded to the owner of a rent, upon principles analogous to those which are applied in cases of confusion of boundaries. The owner of the rent is entitled to relief in equity (as it is said), "on usage of payment," where in consequence of the confusion of boundaries or otherwise the particular lands upon which the rent is a charge, cannot be fixed on as a fund for the legal remedy by distress.² A very few cases, in which relief was given in equity in matters of rent, exist in the United States; but the instances of the exercise of this jurisdiction are very rare.³

¹ Godfrey v. Littel, 1 Russ. & My. 59; 2 Russ. & My. 630. It is not necessary that the title should be *admitted* by the defendant; it may be established by evidence; Godfrey v. Littel (*supra*), overruling Bishop of Ely v. Kenrick, Bunb. 322.

² See Duke of Leeds v. Powell, 1 Ves. Sr. 171, 172; North v. The Earl of Strafford, 3 P. Wms. 148; Bouverie v. Prentice, 1 Bro. C. C. 200; Duke of Leeds v. The Corporation of New Radnor, 2 Bro. C. C. 518; Mayor of Basingstoke v. Lord Bolton, 1 Drew. 289; note to Wake v. Conyers, 2 Lead. Cas. Eq. 445 (4th Eng. ed.). See, also, Benson v. Baldwin, 1 Atk. 598.

³ Dawson v. Williams, 1 Freem. Ch. 99;

Lawrence v. Hammett, 3 J. J. Marsh. 287. See Livingston v. Livingston, 4 Johns. Ch. 287, 290. In Story's Equity Jurisprudence, chapter xvi., a number of instances in which the English High Court of Chancery has exercised jurisdiction in matters of rent, are grouped together. These cases, however, seem referable to other heads of equity jurisdiction (such as Discovery, Specific Performance, etc.); and do not constitute a distinctive equitable remedy. It may be doubted whether, in modern times, the courts will not refuse to follow many of these old authorities; see Walters v. The Northern Coal Mining Company, 5 De G. M. & G. 629, 646, 647.

CHAPTER V.

PARTNERSHIP BILLS.

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| 505. Reasons for resorting to equity in partnership cases.
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505. WHEN the relations which exist between partners come to be dealt with by judicial tribunals, it is sometimes found necessary in order to do exact justice that an account should be taken, that a dissolution should be decreed, that assets should be called in and protected, that a sale of partnership property should be ordered, and that an equitable distribution of the proceeds should be made.

It is evident that none of these desired ends can be fully attained by common law process, and some of them cannot be attained at all. An action of account may, it is true, be brought; but the disadvantages of that action, and the superiority of the equitable procedure have been already pointed out. Breaches of distinct agreements in the partnership articles may also be the subjects of the common law actions of covenant or assumpsit, according as the articles are under seal or in parol; and actions have, moreover, been brought to recover damages for a wrongful

dissolution, or for refusing to enter into a stipulated partnership.¹ But no common law writ exists by which a partnership can be dissolved, its assets protected pending litigation between the partners, or a sale of the partnership property ordered; nor do the common law rules as to debtor and creditor furnish a system for the proper distribution of the partnership effects. Hence there has arisen a necessity for an equitable remedy based upon the inability of the common law courts to answer the requirements of justice. Bills for applying this equitable remedy are termed Partnership Bills; and are, generally, designed to effect a dissolution of the partnership, the protection of its property, an account, and a distribution of its assets.

506. This inability of the common law forms of action to deal with many of the consequences of the contract of partnership, grows out of the nature of the contract itself—which is one of agency, each partner holding towards his copartner the double position of principal and agent. Hence arises the capacity of each partner to contract partnership debts, and to acquire and deal with partnership assets, and to enjoy his due proportion of the profits of the concern.²

A dissolution of the partnership is a rescission of the contract, and *this* a court of law cannot compel; and the faithful performance of this contract necessitates a rendering of accounts, and a guardianship and distribution of property, which a court of law cannot adequately enforce.

507. It must be remembered that the relations of partners with each other, and with third parties, may give rise to many reasons for the interference of a chancellor, which do not call for the exercise of the particular equitable remedy now under consideration. Thus a bill may, under certain circumstances, be filed to compel the execution of partnership articles,³ or com-

¹ *Addams v. Tutton*, 3 Wright (Pa.), 447; *McNeill v. Reid*, 9 Bing. 68; *Vance v. Blair*, 18 Ohio, 532; *Parsons on Partnership*, 237.

² *Cox v. Hickman*, 8 H. L. Cas. 268.

³ The better opinion now seems to be that if two persons have agreed to enter into partnership, and one of them refuses to abide by the agreement, the remedy

for the other is, generally, an action for damages, and not a bill for specific performance. *Scott v. Rayment*, L. R. 7 Eq. 112; *Hercy v. Birch*, 9 Ves. 357; *Lindley on Partnership*, 991 (3d ed.); *Parsons on Partnership*, 235; *Crawshay v. Maule*, 1 Swanst. 511, and notes. To compel an unwilling person (it has been said) to become a partner with another, would not

pliance with particular stipulations in the same;¹ but such a bill is one in which the peculiar remedy of specific performance is invoked; and would, therefore, fall under that general head of equitable jurisdiction. So, also, an *injunction* may be obtained to prevent a violation of partnership articles, or a misappropriation of partnership funds,² or (in some cases) a wrongful dissolution of the firm;³ while the equitable remedy of *discovery* may be, and frequently is, called into play for the purpose of enabling one partner to assert his rights against his copartner.⁴

508. But the basis of the equitable remedy now to be noticed is the necessity for the due winding-up of a partnership; and this equity alone, independently of any other considerations, will entitle a suitor to demand relief at the hand of a chancellor.⁵

A question which frequently arises upon the threshold of this subject is, whether a bill for an account which does not seek a dissolution of the partnership will be entertained. It is asserted by some text writers that such a bill will not lie;⁶ that is to say, that equity will not interfere to order an account which contemplates a continuance of the partnership. But the proposition cannot, perhaps, be so broadly asserted.

In England, while the question may not be entirely settled, the current of modern authority is certainly in favor of relaxing the rule; and it may be stated, as a general proposition, that courts of equity will not, if they can avoid it, allow a partner

be conducive to the welfare of the latter, any more than to compel a man to marry a woman he did not like, would be for the benefit of the lady. Lindley on Partnership, *ut sup.* However, if the parties have agreed to execute some formal instrument, which would have the effect of altering their position at law, and of conferring rights which do not exist so long as the agreement is not carried out; in such a case, and for the purpose of putting the parties into the legal position agreed upon, the execution of that formal instrument may be decreed, although the partnership thereby formed might be immediately dissolved. See *England v. Curling*, 8 Beav. 129; Lindley on Partnership, 992.

¹ See *Whittaker v. Howe*, 3 Beav. 383; *Turner v. Major*, 3 Giff. 442; *Lingen v. Simpson*, 1 Sim. & Stu. 600; *Morris v. Kearsley*, 2 Y. & C. Exch. 139; *Essex v. Essex*, 20 Beav. 442; *Homfray v. Fothergill*, L. R. 1 Eq. 567; *Aubin v. Holt*, 2 K. & J. 66; Lindley on Partnership, 994, 995 (3d ed.). See, also, *Downs v. Collins*, 6 Hare, 418; *Cooper v. Hood*, 7 Week. Rep. 83.

² See *ante*, p. 385. Lindley on Partnership, 1053 (3d ed.).

³ See *Blisset v. Daniel*, 10 Hare, 493; Lindley on Partnership, 232 (3d ed.).

⁴ Lindley on Partnership, 1012 (3d ed.).

⁵ *Id.* 1078.

⁶ Adams's Doct. Eq. 241.

to derive advantage from his own misconduct, by compelling his copartner to submit either to a continued wrong or to a dissolution.¹ The rule will certainly not be applied to the case of joint stock companies, or other associations of which the members are very numerous.²

In Pennsylvania it has been decided that a bill for an account will be entertained; although it does not pray a dissolution.³

509. Bills for the administration of partnership assets may either be filed after dissolution, or they may be filed for the purpose of obtaining a decree for a dissolution and subsequent administration.

It is well known that a partnership may be dissolved in many ways. Thus a dissolution may result either from the effluxion of time, or from mutual agreement, or from the death or bankruptcy of a partner, or from a seizure and sale of a partner's share under an execution, or from a voluntary assignment by one partner of all his interest in the firm, or from the act of God, or the act of government, as from a war between the countries of the partners, or from some of the members becoming a body politic.⁴ So, if no specific term for the duration of the partnership has been fixed, it may be dissolved at the option of any of the partners; and even where a partnership has been formed for a definite period, it has been held, in some cases, that it was within the power of any partner to dissolve it.⁵ Where a partnership has been thus dissolved, the objects of the bill

¹ Fairthorne v. Weston, 3 Hare, 392; Lindley on Partnership, 934, 1003, 1004 (3d ed.). See Walworth v. Holt, 4 Myl. & Cr. 619.

² Adams's Doct. Eq. 241.

³ Hudson v. Barrett, 1 Pars. Eq. 414. See Marble Co. v. Ripley, 10 Wal. 339.

⁴ In Lindley on Partnership, 231 (3d Eng. ed.), the grounds for a dissolution are stated to be the following: 1. The will of any partner; 2. The impossibility of going on in consequence of the hopeless state of the partnership business, or insanity, or misconduct and destruction of mutual confidence; 3. The transfer of a partner's interest; 4. Death;

5. The occurrence of some event which renders the continuance of the partnership illegal; and 6. Fraud vitiating the original contract. See, also, Parsons on Partnership, chap. xii.

⁵ Skinner v. Dayton, 19 Johns. 538; Mason v. Connell, 1 Whart. 381; and see Bishop v. Breckles, 1 Hoff. Ch. 534. But the law has been assumed to be the other way in several authorities. See Peacock v. Peacock, 16 Ves. 57; Crawshay v. Maule, 1 Swanst. 508; Wheeler v. Van Wart, 9 Sim. 193; Pearpoint v. Graham, 4 Wash. C. C. 232; Parsons on Partnership, 401.

are that an account should be taken, and that the firm assets should be properly protected and duly distributed. But in many partnership suits the main object of the bill is a decree for a dissolution;¹ and such a decree can, of course, only be made upon proper cause. The general ground for a dissolution is that the partnership cannot be carried on for the benefit of the parties, according to the original intention; and this may result either from something independent of the conduct of the partners, *e. g.*, that the principles upon which the partnership is based are found to be erroneous and impracticable;² or from the conduct of a partner, as if he is acting fraudulently, is assuming exclusive control of the business, or is guilty of breaches of faith, or other gross misconduct;³ or from the incapacity of a partner, as, for example, his lunacy.⁴

But trifling faults, or quarrels between the parties will not justify a decree for dissolution;⁵ nor will such a decree be necessarily warranted by a breach of partnership articles.⁶

510. If the partnership has become *ipso facto* dissolved for any of the reasons mentioned above, or if a decree for its dissolution has been made for cause, the next subject which occupies the

¹ In *Master v. Kirton*, 3 Ves. 74, the bill was demurred to on the ground that the partnership was a partnership at will, and could, therefore, be dissolved without a decree of the court. The demurrer was overruled.

² See *Baring v. Dix*, 1 Cox, 213. And a dissolution may be decreed where the original capital has been all spent, and some of the partners are unable or unwilling to advance more money, and at the same time the concern cannot go on except at a loss unless they do. *Jennings v. Baddeley*, 3 K. & J. 78.

³ See *Kennedy v. Kennedy*, 3 Dana, 239; *Williamson v. Wilson*, 1 Bland, 418; *Berry v. Cross*, 3 Sandf. Ch. 1; *Holden v. McMakin*, 1 Pars. Eq. Cas. 270; *Miller v. Jones*, 39 Illinois, 54; *Maynard v. Railey*, 2 Nevada, 313, 318; *Shulte v. Hoffman*, 18 Tex. 678; *Seibert v. Seibert*, 1 Brewster, 531; *Page v. Vankirk*, *Id.* 287.

⁴ *Anonymous*, 2 K. & J. 441. The better opinion now seems to be that lunacy of one of the partners will not *ipso facto* be a dissolution, although, when of a confirmed character, it will warrant a decree for dissolution. *Jones v. Noy*, 2 Myl. & K. 125; *Rowlands v. Evans*, 30 Beav. 302; *Lindley on Partnership*, 235, 236 (3d ed.). In *Davis v. Lane*, 10 N. Hamp. 161, and *Isler v. Baker*, 6 Hump. 85, however, the rule that lunacy did not operate, of itself, as a dissolution, was disapproved. See *Parsons on Partnership*, 465.

⁵ *Goodman v. Whitcomb*, 1 J. & W. 569; *Henn v. Walsh*, 2 Edw. C. R. 129; *Parsons on Partnership*, 458; *Lindley on Partnership*, 238 (3d ed.). See, also, *Bishop v. Breckles*, 1 Hoff. Ch. 534; *Watney v. Wells*, 30 Beav. 56; *Stevens v. Yeatman*, 19 Maryl. 480.

⁶ *Anderson v. Anderson*, 25 Beav. 190.

attention of the court is the necessity for preserving the property of the firm, and for the intermediate management of the concern, while the process of winding-up is going on.¹ If there is no objection, these duties may be left to the parties. The duty of liquidation is sometimes assigned to one partner by express agreement, and it sometimes devolves upon him by operation of law—as in the case of a surviving or solvent partner. But where all the partners are dead, or where the management of affairs cannot be safely entrusted to any of the parties, the court will interfere, and will appoint a receiver to take charge of the property and wind up the business.

It would be impossible to enter into a detailed statement of all the causes which will justify the appointment of a receiver.¹ It will be sufficient to observe here that where a dissolution has been decreed in consequence of the improper conduct of parties, or some similar cause, a receiver will be appointed as a matter of course, the reason being that the same causes which justify a decree for dissolution in such cases will also justify an appointment of a receiver; but that where a dissolution has already taken place, and the bill is filed simply for a proper administration of partnership assets, a receiver will not be appointed as a matter of course, but only when there is some mismanagement or improper conduct on the part of the person who has the custody of the property.²

The remedy of injunction is also sometimes called into play upon proper cause shown.³

511. In pursuing the duty of getting in and administering the partnership assets, a court of chancery has the power to order a sale of real estate.

¹ For authorities illustrative of the cases in which receivers will be appointed, see *Hall v. Hall*, 3 MacN. & G. 90; *Const. v. Harris*, T. & R. 517; *Gowan v. Jeffries*, 2 Ashmead, 296; *Williamson v. Wilson*, 1 Bland, 418; *Randall v. Morrell*, 2 C. E. Green, 346; *Holden v. McMakin*, 1 Pars. Eq. Cas. 270; *Miller v. Jones*, 39 Ill. 54; *Saylor v. Mockbie*, 9 Withrow (la.), 209; *Boyce v. Burchard*, 21 Georgia, 74; *Maynard v. Railey*, 2 Nevada, 313; *Shulte v. Hoffman*, 18 Tex. 678; *Seibert v. Seibert*, 1 Brewster, 531; *Page v. Vankirk*, *Id.* 287; *Kerr on Receivers*, 81 *et seq.* (1st Am. ed.).

² *Kerr on Receivers*, *ut sup.* Even where a dissolution is contemplated by the decree, it is not, in all cases, proper to appoint a receiver; *Kerr on Receivers*, 89 (1st Am. ed.).

³ *Ante*, p. 385.

It is a general rule that when real estate is purchased with partnership funds for partnership purposes, and without any intention of withdrawing the funds from the firm for the use of all or any of the members thereof as individuals, such real estate is to be considered as partnership property, and as liable to all the equitable rights of the partners between themselves.¹ The result of this rule is that as each partner has an equity to insist upon a sale of such real estate, it is to be treated as personalty for the purposes of the partnership; but whether it is to be so treated for *all* purposes is a question upon which there has been some conflict of authority.

It has been contended, on the one hand, that the conversion of realty into personalty is a conversion "out and out," and that after it has been appropriated to the partnership liabilities, the surplus (if any) is payable to the personal representatives and not to the heir of a deceased partner. This is now the rule in England. After some fluctuations in the law, the conclusions which have been finally reached are that wherever a partnership purchases real estate for the partnership purposes and with partnership funds, it is, as between the real and personal representatives of the partners, personal estate;² that it makes no difference as respects the question of conversion, whether the land was purchased with partnership moneys, or whether it was acquired in any other way, provided the land is, in the proper sense of the term, an asset of the partnership;³ but that the general rule may be excluded by an agreement, express or implied, to the effect that the land shall not be sold, for the reason of the rule (which is that each partner has an equity for a sale of the land) excludes its application in such a case.⁴

512. In the United States, however, the general tendency of the authorities is to limit the conversion to the purposes of the

¹ *Buchan v. Sumner*, 2 Barb. Ch. 198; *Hoxie v. Carr*, 1 Sumn. 181; *Abbott's Appeal*, 14 Wright (Pa.), 234; *Meily v. Wood*, 21 P. F. Sm. 488; *Uhler v. Semple*, 5 C. E. Green, 288; *Sigourney v. Munn*, 7 Conn. 11; *Wallis v. Freeman*, 35 Verm. 44; *Clagett v. Kilbourne*, 1 Black (U. S.), 346; 3 Kent's Com. 39; *Parsons on Partnership*, 363, 369.

² *Darby v. Darby*, 3 Drew. 506.

³ See the remarks of Lord Eldon in *Jackson v. Jackson*, 9 Ves. 593. See, also, *Waterer v. Waterer*, L. R. 14 Eq. 402.

⁴ *Steward v. Blakeway*, L. R. 4 Ch. App. 603, and L. R. 6 Eq. 479; *Lindley on Partnership*, 690, 691 (3d ed.).

partnership, and *ultra* those purposes to treat the property as if in its original state. The consequence of this doctrine is that the surplus, after the partnership liabilities and equities have been answered, will go to the real, and not to the personal representatives of a deceased partner. This is perhaps the general doctrine throughout the Union;¹ although in Kentucky the English rule is followed,² and in Virginia the question does not seem to be settled, the English rule having been at one time adopted;³ and the point in subsequent decisions having been treated as doubtful.⁴

513. The general rule as to conversion, stated above,⁵ is, it will be observed, subject to the qualification that where the purchase is made with an intention of withdrawing the funds from the firm for the use of all or any of the members thereof as individuals, the real estate so purchased will not be considered as personal property—in other words, the doctrine of conversion will not apply; and further, that if land belongs to all the partners as tenants in common but not as partners, and the land is used by them for partnership purposes, but is nevertheless intended to remain vested in them as tenants in common, and not to form part of the assets of the firm, the share of each partner will be real, and not personal estate.

A result of the first portion of the above qualification has been held in Pennsylvania to be, that to affect strangers—purchasers, mortgagees, and creditors—there must be some written evidence of the intention of the partners to make the real estate partnership assets, and that where there is simply a conveyance to them as tenants in common, it is not competent to show by parol evidence that the property was in fact designed to

¹ *Dyer v. Clark*, 5 Met. 562; *Wilcox v. 212*; 3 Kent's Com. 40 (12th ed.); *Parsons on Partnership*, 371; American note to *Lake v. Gibson*, 1 Lead. Cas. Eq. 242 (3d Am. ed.).
² *Bank of Louisville v. Hall*, 8 Bush, 672; *Cornwall v. Cornwall*, 6 *Id.* 369.
³ *Pierce v. Trigg*, 10 Leigh, 406.
⁴ *Jones v. Neale*, 2 Pat. & H. 339; *Davis v. Christian*, 15 Grat. 11.
⁵ *Ante*, p. 458.

¹ *Dyer v. Clark*, 5 Met. 562; *Wilcox v. 212*; 3 Kent's Com. 40 (12th ed.); *Parsons on Partnership*, 371; American note to *Lake v. Gibson*, 1 Lead. Cas. Eq. 242 (3d Am. ed.).
² *Bank of Louisville v. Hall*, 8 Bush, 672; *Cornwall v. Cornwall*, 6 *Id.* 369.
³ *Pierce v. Trigg*, 10 Leigh, 406.
⁴ *Jones v. Neale*, 2 Pat. & H. 339; *Davis v. Christian*, 15 Grat. 11.
⁵ *Ante*, p. 458.

form part of the partnership assets,¹ or even that this fact was known to a purchaser.²

The opinion in other States of the Union appears to be adverse to following this doctrine, at least to the same extent.³

Of the second part of the above-stated qualification, an illustration may be found in *Steward v. Blakeway*,⁴ where it was held that a farm and quarry worked by co-owners in partnership, and additional lands bought by them out of their profits for the purposes of their business, were not to be treated as converted into money, because no partner could have enforced a sale of the property.

514. Both the realty and the personalty of the firm may be sold by order of court; and a sale is generally necessary in order to effect the winding-up of a concern; as it has been held that one partner cannot take the partnership stock at a valuation, but its value must be ascertained by its conversion into money.⁵

An account is a part of the relief which the court decrees in partnership bills. This account is taken before a master, who is armed with the necessary powers to effectuate the object for which he is appointed.⁶ In taking the partnership accounts, a surviving partner will be regarded as a trustee, and will be ordinarily responsible for any profits which he may have made after the dissolution.⁷

515. After the partnership assets have been realized, the next step is their appropriation to the payment of partnership liabilities. In doing this the court applies certain equitable doctrines which might not improperly fall under the general

¹ *Ridgway's Appeal*, 3 Harris, 177. See, also, *McDermot v. Laurence*, 7 Serg. & R. 438; *Lefevre's Appeal*, 19 P. F. Sm. 125; and *Ebbert's Appeal*, 20 *Id.* 79.

² *Hale v. Henrie*, 2 Watts, 143.

³ See *Fall River Whaling Co. v. Borden*, 10 Cush, 458; *Parsons on Partnership*, 878, note; *Story on Partnership*, § 93, note (6th ed.); *Am. note to 1 Lead. Cas. Eq.* 241.

⁴ 4 Ch. App. 603. See *Thompson v. Bowman*, 6 Wal. 316.

⁵ *Sigourney v. Munn*, 7 Conn. 11; *Dickinson v. Dickinson*, 29 *Id.* 600.

⁶ *Story's Eq. Jurisp.*, § 672. In England a number of statutes (commonly known as the Winding-up Acts) have been passed facilitating the settlement of partnership affairs. They will be found collected and discussed in *Lindley on Partnership*, Book IV., chap. iii. (3d Eng. ed.).

⁷ See *Phillips v. Atkinson*, 2 Bro. Ch. 272; *Hartz v. Schrader*, 8 Ves. 317; *Waring v. Cram*, 1 Pars. Eq. Cas. 522; *Washburn v. Goodman*, 17 Pick. 519; *Case v. Abeel*, 1 Paige Ch. 398; *Parsons on Partnership*, 442.

head of Adjustment, but which it was thought might be more advantageously reserved for consideration in the present connection.

In the case of a winding-up of a solvent concern no conflict between the rights of different sets of creditors can, of course, occur. But where the partnership property is insufficient to meet the partnership liabilities, questions may, and frequently do, arise between the creditors of the firm and the creditors of individual members thereof.

It is a general rule in the first place, both in England and in this country, that partnership assets must be applied in the first instance to the payment of partnership debts.¹ This is not a right of the partnership creditors, but is an equity of each partner that the firm property should go to firm creditors. The equity of the joint creditors depends upon and must be worked out through the medium of the equities of the partners themselves.²

516. It is, moreover, the rule in England and in many of the United States, that separate assets are to be applied in the first instance to the payment of individual debts; and that the joint creditors are entitled only to the surplus after such payment.³ In many other States, however, this rule has not been followed. The origin of this doctrine appears to be as follows: At law in case of the death of a partner, the survivor alone was liable; the

¹ *Ex parte Cook*, 2 P. Wms. 500; *Lindley on Partnership*, 1201 (3d ed.); *Murrill v. Neill*, 8 How. 414; *Inbusch v. Farwell*, 1 Black (U. S.), 566; *Crooker v. Crooker*, 46 Maine, 250; 52 *Id.* 267; *Treadwell v. Brown*, 41 N. Hamp. 12; *Fall River Whaling Co. v. Borden*, 10 Cush. 458; *Witter v. Richards*, 10 Conn. 37; *Morgan v. Skidmore*, 56 Barb. 263; *Hill v. Beach*, 1 Beas. 31; *Black's Appeal*, 8 Wright (Pa.) 503; *Simmons v. Tongue*, 3 Bland. 356; *Tunno v. Trezevant*, 2 Desaus. 270; *Lucas v. Atwood*, 2 Stewart, 378; *White v. Dougherty*, 1 Mart. & Yerg. 309; *Hubble v. Perrin*, 3 Ham. 287; *Talbot v. Pierce*, 14 B. Monr. 195; *Converse v.*

McKee, 14 Tex. 20; *Parsons on Partnership*, 480.

² *Ex parte Ruffin*, 6 Vesey, 119; *Campbell v. Mullett*, 2 Swanst. 551, 575; *Skipp v. Harwood*, *Id.* 586; *Allen v. The Centre Valley Co.*, 21 Conn. 130, 135; *Washburn v. The Bank of Bellows Falls*, 19 Verm. 278, 291; *Doner v. Stauffer*, 1 Pen. & Watts, 198; *Lindley on Partnership*, 1206 (3d ed.); *American note to Silk v. Prime*, 2 Lead. Cas. Eq. 327.

³ *Gray v. Chiswell*, 9 Ves. 119; *Lindley on Partnership*, 1201 (3d ed.); *Allen v. Wells*, 22 Pick. 453; *Bardwell v. Perry*, 19 Verm. 292; *Murray v. Murray*, 5 Johns. Ch. 60; *Parsons on Partnership*, 480, 548.

estate of the deceased partner could be reached only in equity. But while equity regarded the estate of the deceased partner as assets for the payment of the firm debts, it was careful to observe the principles which govern the distribution of equitable assets, among which is the doctrine that legal priorities must be observed. As the individual creditors of the deceased partner had a legal right to be satisfied out of his estate, it necessarily follows that this right must be first regarded before the purely equitable right of the joint creditors could be enforced; in other words, the latter was logically postponed to the former. Hence the separate estate, in such a case, was said to be applicable, in the first instance, to pay the separate debts. So far the rule was perfectly logical; but its subsequent extension was, perhaps, not so.¹

517. When both of the partners of a firm, of which the assets are in the course of distribution, are alive, or when the estate to be administered is that of the surviving partner, the joint creditors have an equal legal right with the separate creditors, the partnership debts being both joint and several. In such cases there is no reason for invoking any equity in favor of joint creditors to enable them to reach separate assets, because they are already entitled to do so by virtue of their legal position. Hence as the rights of all parties are of a strictly legal character, there would seem, logically, to be no reason why the rights of one set of creditors should be preferred over those of another set; in other words, why, in the distribution of the separate estate, the separate creditors should have any priority over the joint. But this line of reasoning, however sound it may be theoretically, has not, in practice, found favor with the English courts. The rule is now well settled that not only in the case of a deceased partner leaving his copartner surviving, but also in the case of the death of a surviving partner, or in the winding-up of a partnership during the lifetime of both the parties, separate assets are to be applied in the first instance to the payment of separate debts, and that joint creditors are not

¹ See American note to *Silk v. Prime*, reason of the rule (as stated in the text)
2 Lead. Cas. Eq. 314 (3 Am. ed.), where explained.
the authorities are examined, and the

entitled to come in until individual creditors are satisfied.¹ The theory upon which this rule is based appears to be that as joint assets are applicable in the first instance to joint debts, it is equitable that separate assets should in like manner be appropriated to separate debts; and it has been, therefore, held not to apply to those cases in which there is no partnership property, and no living solvent partner. In such cases the joint creditors have a right to come in against the separate assets *pari passu* with the separate creditors.²

518. The English rule upon this subject has been adopted in many adjudged cases in this country, including at least one decision by the Supreme Court of the United States.³ But the same high tribunal has decided the other way in *Tucker v. Oxley*;⁴ where it was said to be unjust to apply the estate of each individual to the discharge of the several debts, to the entire exclusion of the joint creditors, who previous to the bankruptcy of the partners had a legal and equitable right to satisfaction out of the separate estate of each; and a similar conclusion has been reached by many other courts throughout the Union. In these decisions, however, there is a general disposition to favor the marshalling of assets, so as to compel the joint creditors to resort, in the first instance, to the partnership funds; which, it would seem, in fairness and equity, ought to be done. In some cases, indeed, the rule in *Tucker v. Oxley* has been pushed too far; and in several States the subject has been regulated by statute. It would be impossible, in a treatise like the present, to enter minutely into these different decisions and legislative enactments. All that can be done is to state the English rule, and the rule in *Tucker v. Oxley*, with the theories upon which these two different doctrines appear respectively to be based.⁵

¹ Note to *Silk v. Prime*, 2 Lead. Cas. Eq. 317 (3d Am. ed.).

² Story on Partnership, § 880. The subject of the distribution of joint and separate estates in bankruptcy, will be found discussed in Lindley on Partnership, Book IV., chap. ii., sect. iv.

³ *Murrill v. Neill*, 8 How. 414; *Ameri-*

can note to *Silk v. Prime*, 2 Lead. Cas. Eq. 321.

⁴ 5 Cranch, 34.

⁵ See notes to *Silk v. Prime* (*supra*), where the subject is elaborately discussed. See, also, *Black's Appeal*, 8 Wright (Pa.), 503; *Kuhns v. Law*, 14 Rich. (Law), 18; Story on Partnership, § 376, and notes.

519. The Act of March 2d, 1867, to establish a uniform system of bankruptcy throughout the United States, provides, in its thirty-sixth section, that where a firm has been declared bankrupt, the partnership assets are to be distributed in the first instance among the partnership creditors, and the individual assets among the separate creditors. The rule being thus regulated by statute, the difference between the views discussed above becomes, of course, immaterial when partnership property comes to be distributed under the bankrupt law.¹

After the debts of the partnership have been paid, if there is any surplus it is, of course, divided among the partners, the due proportion of each being ascertained by an account.

520. Before leaving the discussion of the equitable remedy by partnership bills, one or two other matters connected with the general subject of partnership may properly be noticed.

It was stated above that the right to have partnership assets applied in the first instance to the payment of firm debts, is an equity, not of the firm creditors, but of the partners themselves.

It is a consequence of this doctrine that these creditors have no standing in equity to restrain any disposition of partnership assets until they have exhausted all their legal remedies. It is not until they have endeavored to enforce the collection of their debts by execution at law and failed, that they can have recourse to a bill in equity.² Such a proceeding is termed a creditor's bill, the general nature of which will be explained hereafter. By means of such a bill, after an execution has been returned unsatisfied, a creditor can restrain the fraudulent disposition of property which ought to be applied to the payment of his debt, or may reach any property which has been thus fraudulently disposed of.

521. The fact that partnership assets are to be applied in the first instance to the payment of firm debts, does not exempt them from liability to the separate debts of each partner, so far as that individual's interest is concerned, and subject to the equities of the other members of the firm.

¹ See Brightly's Annotated Bankrupt C. 593; Am. note to *Silk v. Prime*, 2 Act, 74, 75, 76. Lead. Cas. Eq. 334.

² *Greenwood v. Brodhead*, 8 Barb. S.

A separate creditor of a partner has, therefore, a right to issue an execution against partnership effects, and levy upon and sell the separate interest of the debtor therein. The purchaser at such a sale does not acquire an absolute and entire interest in the goods sold, but only a right which is subject to the paramount right of the other partners to have them applied to the payment of the firm debts should the financial condition of the partnership require it, and also to any balance due by the debtor upon the settlement of accounts between himself and his copartners. In short, he has the right to call for an account.¹ Whether an injunction can be issued to restrain the separate creditor from proceeding to a levy and sale of the partnership goods, is a question upon which the authorities are somewhat conflicting. Where, however, the firm is insolvent, and, therefore, the separate creditor could gain nothing by his execution, there would seem to be much reason in holding that equity ought to interfere on behalf of the other partners.²

522. It sometimes happens that levies under executions issued at the suit of both joint and separate creditors are made simultaneously, and in such cases questions of no little difficulty frequently arise. The proper course for the sheriff to pursue in such cases would seem to be to sell under both writs in the order of time in which he received them, and leave the rights of the parties to be decided subsequently in equity.³ This appears to be the course adopted in England.⁴ The decisions in the United States upon this point are not uniform. In some States the method above stated has been approved. In others, the separate execution has been considered as superseded by the joint execution, and the separate creditor is consequently excluded. The English course would seem to be most conformable to principle; while the other view has convenience in its favor. When such a coincidence of executions occurs, the joint creditors would,

¹ Story on Partnership, § 263; Am. note to *Silk v. Prime*, 2 Lead. Cas. Eq. 338; *Story's Eq. Jurisp.*, § 677. 335. See, also, *Taylor v. Fields*, 4 Ves. 396; *Bank v. Carrolton Railroad*, 11 Wal. 628.

² Am. note to *Silk v. Prime*, 2 Lead. Cas. Eq. 338; *Story's Eq. Jurisp.*, § 677.

³ Am. note to *Silk v. Prime*, 2 Lead. Cas. Eq. 337.

⁴ *Id.*

perhaps, have the right to restrain the separate creditors by injunction if the firm is insolvent.¹

When the separate interest of each and every partner is levied upon and sold for individual debts, the purchaser will take the whole interest, and the partnership creditors can subsequently have no claim.² The equities of all the partners being swept away by the sale, the rights of the firm creditors necessarily fall with them. But if before such sale another levy is made under a partnership judgment, the purchase-money under such a levy will be applicable in the first instance to the payment of the partnership debts.³

523. It is said that another instance in which equity affords relief in partnership cases where no remedy exists at law, is to be found in those cases in which there is a creditor firm and a debtor firm having a common member. It is well known that in such a case no common law action would lie, as no person can be both plaintiff and defendant in the same suit. "But there is no difficulty" (it has been observed by a writer of the highest authority) "in proceeding in courts of equity to a final adjustment of all the concerns of both firms in regard to each other."⁴ This is undoubtedly true when the affairs of either partnership have for any reason been brought into chancery for settlement. But it may be doubted, with due deference to the distinguished authority just cited, whether any remedy would exist even in equity for the simple collection of a debt due by one solvent firm to another having a common member.⁵ The difficulty has in some States been removed by statute.

524. It has been said, in a learned work, that there is a jurisdiction in equity similar to that exercised in cases of partnership, where mines and collieries are owned and worked by several persons in common.⁶ But it would seem that where there is a joint undertaking to work a mine, that would be a partnership as to such working, though not as to the land, and would fall under the ordinary jurisdiction in partnership cases.⁷ And so,

¹ See Am. note to *Silk v. Prime*, 2 Lead. Cas. Eq. 337, 338, where the subject is discussed.

² *Doner v. Stauffer*, 1 Pen. & Watts, 198.

³ See *Coover's Appeal*, 5 Casey, 9.

⁴ Story's Eq. Jurisp., § 680.

⁵ See Article in *American Law Review*, vol. v. p. 47 (October, 1870).

⁶ *Adams's Doct. Eq.* 247.

⁷ See *Decker v. Howell*, 42 Cal. 642.

also, where there was evidence that the whole property was intended to be used in the business, then the partnership would extend to the land. In the absence, however, of such an understanding there would appear to be no jurisdiction apart from that which exists between tenants in common.¹

CHAPTER VI.

CREDITORS' BILLS AND ADMINISTRATION SUITS.

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| 525. Creditors' Bills; are of two classes. | 532. Origin of the doctrine. |
| 526. Creditors' Bills against a debtor during lifetime; inefficiency of common law executions. | 533. <i>Silk v. Prime</i> . |
| 527. Nature and effect of the Equitable remedy. | 534. <i>Cook v. Gregson</i> . |
| 528. Creditors' Bills of the second class; Administration suits. | 535. Doctrine of Performance. |
| 529. Not of great importance in this country. | 536. Covenant to settle, and subsequent purchase. |
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| | 540. Of legacies by portions; of portions by legacies. |

525. CREDITORS' bills are bills filed by creditors for the purpose of collecting their debts out of the real or personal property of the debtor, under circumstances in which the process of execution at common law could not afford relief. This equitable remedy may be made use of during the lifetime of the debtor, or after his death. Creditors' bills filed against the estate of a decedent, generally, though not necessarily, partake of the nature of administration suits, and will be considered in that connection. Creditors' bills of the first class—*i. e.*, against a debtor during his lifetime—are now to be noticed.

526. Creditors' bills of the first class may be defined to be bills filed by creditors who seek to satisfy their debts out of

¹ See *Roberts v. Eberhardt*, Kay, 148.

some equitable estate of the defendant, which is not liable to levy and sale under an execution at law, or out of some property which has been put beyond the reach of ordinary legal process.¹ They may be also made use of for the purpose of obtaining discovery of the debtor's property.²

Bills of this description had their origin in the limited scope of the ordinary writs of execution. These writs, being common law writs, were confined in their operation to legal interests. Equitable interests could be reached, if reached at all, in equity alone. It is true that the Statute of Frauds³ gave legal execution against the real estate of which every person was seized in trust for the debtor at the time the execution was sued out. But this exception was obviously very limited in its operation, for it did not extend to chattels real, to trusts under which the debtor has not the whole interest, to equities of redemption, or to any equitable interest which had been parted with before execution sued out. This narrowness of the common law remedy, naturally led to a jurisdiction in equity to afford the necessary relief.

527. Upon a bill being filed in a proper case, the equitable property will be taken into the possession of the court by the appointment of a receiver; the party holding the legal estate will be restrained from interfering with the prosecution of the creditor's remedy; and in the case of an equity of redemption, the judgment creditor is suffered to redeem.⁴

Bills of this description are still made use of in England, although the efficacy of the common law writs of execution has been much increased by legislation; and they are of very frequent occurrence in many of the United States. The threefold advantage of reaching property otherwise exempt, of setting aside fraudulent conveyances, and of discovery, renders a

¹ See *Newman v. Willetts*, 52 Ill. 101. See, also, *Botsford v. Beers*, 11 Conn. 369; *Weed v. Pierce*, 9 Cowen, 722; *Spader v. Davis*, 5 Johns. Ch. 280; 20 Johns. 554; *Bayard v. Hoffman*, 4 Johns. Ch. 450; *Webster v. Folsom*, 58 Maine, 230; *Warner v. Moran*, 60 *Id.* 227; *Dodge v. Griswold*, 8 N. Hamp. 425; *Barry v. Abbott*, 100 Mass. 396; *Lillard v. McGee*, 4 Bibb, 165; *Trippe v. Lowe*, 2 Kelly, 304; *Thurmond v. Reese*, 3 *Id.* 449; *Dargan v. Waring*, 11 Alab. 988, 993; *Dunphy v. Kleinsmith*, 11 Wal. 614; *Tantum v. Green*, 6 C. E. Green, 364; *Hall v. Joiner*, 1 S. Carolina (N. S.), 186; *Turner v. Adams*, 46 Missouri, 95.

² *Newman v. Willetts*, 52 Ill. 101.

³ 29 Car. II., c. 2, § 10.

⁴ See *Adams's Doct. Eq.* 129.

creditors' bill a very effective instrument for the collection of debts.

The leading authorities upon the subject in the United States may be said to be *Spader v. Davis*¹ and *Bayard v. Hoffman*.² In these cases Chancellor Kent, basing his opinion upon some early English decisions,³ held that in cases of fraudulent alienation courts of equity ought to interfere, whether the property could be reached by execution at law or not. Since the time of these decisions the equitable remedy by creditors' bill has been extensively used in many of the United States, and its efficiency has been much increased in several States by statute; and in some instances the remedy is expressly specified in the grant of chancery powers to the courts.⁴

As this remedy is based upon the incapacity to obtain relief at common law, it is incumbent upon the complainant, as a general rule, to show that he has exhausted his common law remedies before resorting to equity.⁵ This is generally done by showing that he has obtained a judgment, has issued execution, and that there has been a return thereon of *nulla bona*.⁶ And these facts must be alleged in the bill to give the court jurisdiction, for otherwise it would not appear but that the party had a complete remedy at law.⁷ This rule, though a stringent one, is nevertheless not without exceptions.⁸

The filing of a creditors' bill, and the service of process, cre-

¹ 5 Johns. Ch. 280; on appeal, *nomine* Hadden v. Spader, 20 Johns. 554.

² 4 Johns. Ch. 452.

³ *Taylor v. Jones*, 2 Atk. 600; *King v. Marissal*, 3 *Id.* 192; *Horn v. Horn*, Ambl. 79. Of this last case, Lord Thurlow is reported to have said: "The opinion in *Horn v. Horn* is so anomalous and unfounded that forty such opinions would not satisfy me." *Grogan v. Cooke*, 2 Ball & Beat. 233. The reasoning of Lord Thurlow prevailed in the English law; and the consequence was, that it subsequently was found necessary to make *choses in action* liable to execution by statute.

⁴ See Introduction, *ante*, pp. 18 to 22.

⁵ *Newman v. Willetts*, 52 Ill. 101; *Hall v. Joiner*, 1 S. Carolina (N. S.), 186.

⁶ See *Beck v. Burdett*, 1 Paige, 305, 308; *Brown v. Long*, 1 Ired. Eq. 190; *McNairy v. Eastland*, 10 Yerg. 310, 319; *Stone v. Manning*, 2 Scam. 530; *Manchester v. McKee*, 4 Gilm. 511; *Miller v. Davidson*, 3 *Id.* 518; *Reese v. Bradford*, 18 Alab. 837; *Webster v. Clark*, 25 Maine, 813; *Tappan v. Evans*, 11 N. Hamp. 312; *Allen v. Montgomery*, 48 Miss. 106; note to *Sexton v. Wheaton*, 1 Am. Lead. Cas. 54, 55.

⁷ *Newman v. Willetts*, 52 Ill. 101.

⁸ See *Turner v. Adams*, 46 Missouri, 95; *Botsford v. Beers*, 11 Conn. 369; *Stephens v. Beal*, *Id.* 319.

ates a lien in equity upon the effects of a judgment debtor. It has been aptly termed an "equitable levy."¹ It may be filed by one creditor alone, or by one on behalf of himself and all others who choose to come in.

Bills of this description are sometimes employed for the purpose of subjecting the separate property of married women to the payment of their debts.²

528. Creditors' bills of the second class—*i. e.* those which are filed after the death of the debtor—generally result in an administration of his estate, because the executor or administrator does not generally admit assets in his answer. If, however, assets are admitted, the debt of the creditor who files the bill will be collected, but there will be no decree for the general administration of the estate. In most cases, however, there is no admission of assets, and the court then goes on to ascertain what the assets are, to get them in, and to distribute them properly among creditors, legatees, and other parties interested. When bills for getting in and distributing the estate of a decedent are filed by legatees, they are termed administration suits. The principles which govern the action of the court in administration suits, and in creditors' bills where no assets are admitted, are the same, and may be considered together. A bill for administration may also be filed by an executor or administrator, who (in England) could only obtain complete exoneration by having his accounts passed in chancery, and was, therefore, entitled to insist upon that protection.³

529. Bills for the administration of the estates of decedents are of much less importance, and of much less frequent occurrence, in this country than in England, as the distribution of such assets is, in most States, vested by statute in Probate or Orphans' Courts, or similar tribunals. In some States, however, the jurisdiction of chancery by administration suits is expressly conferred upon the courts;⁴ and in some instances the equitable remedy has to be invoked in order to meet cases which cannot

¹ *Tilford v. Burnham*, 7 Dana, 110; *Miller v. Sherry*, 2 Wal. 249.

² *Adams's Eq.* 257. See, also, *Brown v. McDonald*, 1 Hill C. R. 300; *Adams v.*

³ See *Lillia v. Airey*, 1 Ves. Jr. 277; *Methodist Episcopal Church v. Jaques*, 1

Dixon, 19 Georgia, 513.

Johns. Ch. 450; *Todd v. Lee*, 15 Wis. 865; *Kerr on Receivers*, 53 (1st Am. ed.).

⁴ See Introduction, *ante*, p. 19 *et seq.*

be properly dealt with in other tribunals.¹ It will, therefore, be proper to state briefly the nature of this equitable remedy, and the doctrines which are generally incidental thereto.

530. Administration bills are usually filed by one or more creditors or legatees on behalf of all;² and the decree, on such bills, is for a general account of the debts, and for an account and application of the personal assets. If the personal estate should prove insufficient, a decree will be made against the realty.³ The bill enures to the benefit of all the creditors who may come in and prove their debts under it, so as to prevent the running of the statute of limitations; but up to the time of the decree for an account, the suit is under the control of the creditor who has filed the bill. After the decree the case is different, as the fund is then in court, and the creditor who has filed the bill ceases to have absolute control of the suit.

Upon the filing of the executor's answer, the balance admitted therein to be in his hands, is ordered to be paid into court; and, if the circumstances warrant such a course, a receiver of the outstanding personalty, and the rents of the real estate, will be appointed.

It sometimes happens that several administration suits are simultaneously instituted by creditors and legatees, and that actions at law are also brought against the executor by parties having claims against the estate. After a decree has been made in one of the administration suits, all the suits will be consolidated; and restraining orders will be issued,⁴ preventing any creditor from proceeding further in his action at law.

¹ See *Hagan v. Walker*, 14 Howard, 33, where a bill was filed by a creditor of a deceased debtor against the administrator, and a party who was fraudulently holding property of the deceased, which, in equity, should have been applied to the payment of his debts. See, also, *Frey v. Demarest*, 1 C. E. Green, 236; *Dorsheimer v. Rorback*, 8 *Id.* 52; *Pharis v. Leachman*, 20 Alab. 662; *Ledyard v. Johnston*, 16 *Id.* 548; *Gould v. Hayes*, 19 *Id.* 438; *Freeland v. Dazey*, 25 Ill. 294; *Carrington v. Didier*, 8 Grat. 260; *Farrar v. Hasel-*

den, 9 Rich. Eq. 336; *Garner v. Lyles*, 35 Miss. 184; *Brown v. McDonald*, 1 Hill (Ch.), 300; *Adams v. Dixon*, 19 Geo. 513; *Thompson v. Brown*, 4 Johns. C. R. 619; *McKay v. Green*, 3 *Id.* 56.

² See *Thompson v. Brown*, 4 Johns. Ch. 619; *Hazen v. Durling*, 1 Green (Ch.) 133.

³ See *Adams's Doct. Eq.* 258.

⁴ It is not now necessary to file an injunction bill; an order may be obtained in the administration suit.

When the assets have been secured, and their administration undertaken by the court, the next step is their distribution.¹

For this purpose a reference is directed to a master, by whom an account of the personal estate, the testamentary expenses, and the legacies is taken, and before whom the debts must be proved. A time is fixed by advertisement, within which all claims must be presented, upon the expiration of which the Master reports the claims which have been established, and the court, by its decree on further directions, authorizes a distribution of the fund among them, and protects the personal representative from any future claim.²

531. As, under the equitable remedy of partnership bills, certain equitable doctrines were considered because their application was most frequent in cases of that kind; so, in treating of the subject of administration suits, it will be proper to notice one or two doctrines, originally peculiar to the court of chancery, which are, in such suits, most frequently called into play. These are the doctrines of Equitable Assets, of Performance, and of Satisfaction.

The doctrine of Equitable Assets is one which has never been extensively applied in the United States, and has lost its importance in England in consequence of the act of 1870,³ by which it is provided that simple contract and specialty creditors are, in future, payable *pari passu* out of both legal and equitable assets.

But it is, perhaps, necessary to say a few words upon the subject of equitable assets, not only because in some States the doctrine may be, occasionally, of practical importance, but also because it furnishes an illustration of the effect which the influence of equitable principles has had upon general jurisprudence both in England and in this country.

532. In England the real, as well as the personal property of a decedent was liable for the payment of his debts; but under the influence of the Feudal system (one of the main objects of which was to transmit real estate in an unimpaired condition

¹ Adams's Doct. Eq. 260.

² *Id.* 262. The above brief statement of the course of an administration suit is principally taken from Adams. Refer-

ence may also be had to Williams on Executors, 2005 (7th Eng. ed.).

³ 32 & 33 Vic., c. 46.

from the ancestor to the heir) the rule grew up that lands in the hands of the heir were not bound for the debts of the ancestor, unless there was some deed or writing under seal (called a special contract or specialty) by which the heir as well as the ancestor was in express terms charged or bound with the payment of the debt. In such a case the heir was liable, on the decease of his ancestor, to pay the debt or fulfil the contract, to the value of the land which had descended to him from his ancestor, but not further, and the lands so descended were termed *assets* by descent, from the French word *assez* (enough), because the heir was bound only so far as he had lands descended to him enough or sufficient to answer the debt or contract of his ancestor.¹ Moreover, if the heir was not expressly named in the obligation, the lands in his hands were not bound; and after the power of testamentary alienation of real estate was conferred by statute, a debtor who had bound his heir by a specialty became enabled to defeat his creditor by devising his estate to some other person than his heir, and in this case neither the heir nor the devisee was under any liability to the creditors. If, however, the ancestor, impelled by a sense of justice, devised the real estate to trustees for the payment of debts, or, what was the same thing, charged it with the payment of debts, the real estate then became trust property, and as such fell under the administration of the court of chancery. Now it is one of the maxims of this court that "equality is equity;" and hence, when the real estate of a decedent came to be applied to the payment of his debts under the supervision of a chancellor, not only were the simple contract debts held entitled to be paid out of the fund, but they were placed upon exactly the same footing as debts by specialty, in other words all the debts were payable *pari passu*.

By various statutes the injustice to creditors, which so long existed in the English law, was abolished, and the land of every debtor, which was not by his will charged with, or devised subject to the payment of his debts, was made assets for the payment of debts, reserving, however, to creditors by specialty in which the heir was bound the same priority which they originally possessed. It will be observed, however, that land expressly charged with or devised subject to the payment of debts was

¹ See Williams on Real Prop. 75; whence the above statement is taken.

exempted from the operation of these statutes, and therefore still fell under the equitable maxim, already stated, that equality is equity. Hence there arose two classes of assets—first, legal assets, or those which by law (either common law or statute) were liable to the payment of debts, and in these the priority of specialty debts was preserved; and, secondly, equitable assets, or those which, being administered solely in the court of chancery, were applicable to the payment of all debts of whatever description *pari passu*. This distinction has been (as already stated) finally abolished by the statute of 1870.¹

533. Before the passage of the statute of 1870, the doctrine of equitable assets occupied a very considerable place in the attention of English chancellors, and the cases by which the doctrine was illustrated and explained are quite numerous. In the present condition of the law, it is conceived that it will be sufficient to notice two of them only. In *Silk v. Prime*² (one of the few judgments of Lord Camden, as chancellor, which have come down to us well reported) the testator, Christopher Thomson, directed the defendants Prime and Moxon (whom he afterwards constituted his executors) to sell his real estate or such parts thereof as should, with his personal estate, be sufficient to pay all his just debts, and to apply the money arising therefrom, together with the money arising from his personal estate, for the payment of all his just debts. It was argued that as the testator had united both funds together in the hands of his trustees and executors, both must be one consolidated fund to follow one course of administration; but the Lord Chancellor said, “the answer is, that in all cases where the trustee and executor is one person the funds are consolidated in the same manner, for out of both he is to pay all his debts; but the course of administration is different, and by this very method it is, that the court is enabled to pay all the debts without distinction, as far as the assets will go, and by marshalling both kinds of assets, makes them amicably combine to answer the full intention of the testator.”

534. In a more modern case the doctrine of equitable assets was thoroughly considered by Vice-Chancellor Kindersley, and

¹ A sketch of the doctrine of equitable assets will be found in *Benson v. Le Roy*, (4th Eng. ed.) 111.

² 1 Bro. C. C. 138 n.; 2 Lead. Cas. Eq. 4 Johns. Ch. 651.

his opinion has been justly regarded as a most clear and learned explanation of the difference between the two kinds of assets.¹ "The general proposition," said that learned judge, "is clear enough, that, when assets are made available in a court of law, they are legal assets; and when they can only be made available through a court of equity, they are equitable assets. This proposition does not, however, refer to the question whether the assets can be recovered by the executor in a court of law or in a court of equity. The distinction refers to the remedies of the creditor, and not to the nature of the property. The question is not whether the testator's interest was legal or equitable, but whether a creditor of the testator seeking to get paid out of such assets, can obtain payment thereout from a court of law, or can only obtain it through a court of equity;" and the vice-chancellor then went on to say that legal assets were such as the executor would have a right to recover, merely *virtute officii*, i. e., which he would have had a right to recover if the testator had merely appointed him executor, without saying anything about his property or the application thereof. Other assets are, of course, equitable assets.

It has been already observed that the doctrine of equitable assets is of little or no importance in this country as a head of chancery jurisprudence, owing to the fact that it has been adopted and incorporated into the statute law of most of the States; in other words, that the debts of decedents are generally paid *pari passu*, subject to some few preferences which have been introduced by statute, and which vary in different States. It has, therefore, been thought sufficient to give a very general explanation of the doctrine; and to refer to the two leading cases cited above.²

The assets of the decedent having been got in, they are applied to the payment of the debts and legacies. The order in

¹ Cook v. Gregson, 8 Drew. 549.

267; Baldy v. Brady, 8 Harris, 108;

² A few of the cases which have occurred in the United States upon the general subject are Benson v. Le Roy, 4 Johns. Ch. 651; Stagg v. Jackson, 1 Comst. 206; Torr's Estate, 2 Rawle, 250; Walker's Estate, 3 Id. 229; Agnew v. Fetterman, 4 Barr, 56; Hoover v. Hoover, 5 Id. 357; Cadbury v. Duval, 10 Id. 332.

Sperry's Estate, 1 Ashm. 347; Cornish v. Wilson, 6 Gill, 303; Backhouse v. Patton, 5 Peters, 160; Henderson v. Burton, 3 Ired. Ch. 259; Helm v. Darby's Admrs., 3 Dana, 185; Cloudas's Extr. v. Adams, 4 Id. 608; Speed's Extr. v. Nelson's Extr., 8 B. Mon. 499; Bull v. Bull,

which assets are, as a general rule, to be applied to the payment of debts, has been attempted to be explained in a former chapter.¹ This order, however, together with the order in which debts are to be paid, is the subject of statutory regulation in most of the States.

535. In applying the assets to the payment of debts and legacies certain equitable doctrines are occasionally brought into play, which have not been hitherto adverted to, and should therefore be briefly noticed. These doctrines grow out of the general equitable principles that equity imputes an intention to fulfil an obligation, and that equity leans against double portions; and they are known by the names of "Performance" and "Satisfaction."

The doctrine of Performance is applied (first) where there is a covenant to purchase and settle land, and a purchase is made not expressed to be made in pursuance of such covenant, and no express settlement is made; and (secondly) where there is a covenant to *leave* property, and the covenantee receives a share under an intestacy.²

536. Upon the first branch of this doctrine the leading authorities are *Lechmere v. The Earl of Carlisle*,³ and *Wilcocks v. Wilcocks*.⁴ From these cases and from subsequent authorities, it has usually been considered that the following propositions could be deduced:—

First. That when a person covenants to purchase and settle lands of a certain value, and afterwards purchases lands of an equal or greater value which descend to his heir, it will be deemed a performance of the covenant.

Second. Where the lands purchased are of less value than the lands covenanted to be purchased or conveyed and settled, they will be considered as purchased in part performance of the covenant.

Third. Where the covenant points to a *future* purchase of land, it cannot be presumed that lands of which the covenantor was seized at the time of the covenant, descending to his heir, were intended to be taken in part performance of it.

¹ *Ante*, p. 322, *et seq.*

² *Snell's Principles of Equity*, 184.

³ 3 Peere Wms. 227; *Cas. temp. Talbot*, 80.

⁴ 2 Vern. 558; 2 Lead. *Cas. Eq.* 415.

Fourth. It cannot be presumed that property of a different nature from that covenanted to be purchased by the covenantor, was intended as a performance.

Fifth. The absence of the required consent of the trustee of the settlement will not rebut the presumption of performance, if other circumstances are favorable.¹

537. Under the second branch (above stated) of the doctrine of Performance, the cases are usually those in which a husband covenants to pay his wife a sum of money, and then dies intestate, so that she becomes entitled under the statute of distributions. In such cases if the death of the husband occurs at or before the time when the covenant should have been performed, the share of the widow will be considered as a performance *pro tanto* or *in toto*, according as it is less than or equal to the sum covenanted to be paid;² but if the death of the husband is *after* a breach of the covenant has occurred, the widow's share will not be considered as a performance.³

Questions of this kind arise principally under marriage articles in England; and have received little, if any, judicial interpretation in this country.

538. Where one person is under some legal or moral obligation to another, and under those circumstances makes a gift of such a nature that it operates as an exact fulfilment of the obligation, there arises a presumption that it was the intention of the donor to discharge the obligation by making the gift; in other words, the gift is presumed to be in satisfaction of the obligation, and hence this presumption, which had its origin in courts of chancery, has given rise to what is known in equity as the doctrine of Satisfaction.

This doctrine has been usually, and doubtless justly, supposed to have been borrowed from the civil law; but it is one which has been frequently regarded with no little disfavor, and hence the presumption upon which it is founded has been always considered to be liable to be rebutted by slight circumstances. The doctrine being founded on the presumed intention of the donor,

¹ See Snell's Principles of Equity, 188; notes, to *Wilcocks v. Wilcocks*, 2 Lead. Cas. Eq. 415.

² *Blandy v. Widmore*, 1 P. Wms. 324; *Goldsmid v. Goldsmid*, 1 Swanst. 211.

³ *Oliver v. Brickland*, cited in 3 Atk. 420.

evidence of his express intention is admissible; and presumptions are also drawn from surrounding circumstances, by which the supposed intention that the gift should operate as a satisfaction, may be contradicted or controlled.

The cases in which the doctrine of satisfaction has been applied have nearly all arisen under wills; and the subject, for the purposes of convenient consideration, may be divided into the satisfaction of debts by legacies; of legacies by subsequent legacies; of legacies by portions; and of portions by legacies.¹

And, first, of the satisfaction of debts by legacies. It is a general rule, both in England and in this country, that a legacy given by a debtor to his creditor, which is equal to or greater in amount than the debt, shall be presumed to be intended as a satisfaction of the debt; but it must be not only equal in amount, but equally beneficial and of the same nature exactly.² It will be observed that this statement of the rule both indicates the general doctrine, and also suggests some considerations by which its application may be controlled.

Chancey's case and *Strong v. Williams* may be cited as authorities in which the general doctrine is admitted, and at the same time several of its qualifications illustrated.³ In the former case a person indebted to his servant for wages, in the sum of £100, gave her a bond for that sum, and afterwards by will gave her £500 for her long and faithful services, and directed that all his debts and legacies should be paid; in the latter, the testator gave a bond to his housekeeper conditioned for the payment of \$333 within six months after his decease, and also a written promise to pay her \$20 annually; and he afterwards in his will bequeathed her a pecuniary legacy of \$300, together with furniture and other chattels valued at \$745; and he devised the residue of his estate subject to the payment of debts and legacies. In both of these cases the general doctrine of satisfaction

¹ See Snell's Equity, 194, whence the division in the text is taken. (3d Am. ed.). See, also, *Wathen v. Smith*, 4 Mad. 325; *Clark v. Sewell*, 3

² 2 Spence Eq. 605.

³ *Chancey's Case*, 1 P. Wms. 408; 2 *Lead Cas. Eq.* (4th Eng. ed.); *Strong v. Williams*, 12 Mass. 391; American note to *Chancey's Case*, 2 *Lead. Cas. Eq.* 587. (3d Am. ed.). See, also, *Wathen v. Smith*, 4 Mad. 325; *Clark v. Sewell*, 3 Atk. 96; *Dey v. Williams*, 2 Dev. & Bat. Eq. 66; *Byrne v. Byrne*, 3 Serg. & Rawle, 54; *Van Riper v. Van Riper*, 1 Green (Ch.), 1; *Parker v. Coburn*, 10 Allen, 82.

was recognized;¹ but in both its application was refused, in Chancey's case, because the intention to satisfy the debt by the legacy was supposed to be rebutted by the express direction that debts *and* legacies should be paid; and in *Strong v. Williams*, not only for the reason in Chancey's case, but also because the pecuniary legacy was less than the amount of the debt, and the specific legacy was of a different *nature*. From these and from other authorities, it will be observed that the presumption of satisfaction will only arise where the amount of the legacy is equal to or greater than that of the debt; and where its *nature* is the same; but that this presumption is liable to be rebutted by any circumstances, to be gathered from the will, or from other sources, showing an *intention* on the part of the testator that a satisfaction should not take place.

Where a creditor gives a legacy to a debtor there is no independent presumption, either at law or in equity, that the legacy is meant as a forgiveness of the debt; such a construction must be established by affirmative proof.²

539. The question of the satisfaction of a legacy by a legacy, may arise either when the second legacy is given by a different instrument, or when both legacies are given by the same instrument. The rules by which the question is to be determined in cases where the two legacies are given by different instruments, were stated by Mr. Justice Aston in the leading case of *Hooley v. Hatton*, decided in 1773, to be (in substance) as follows:—

1. Where there is no internal evidence furnished by the instruments themselves, the general rules of law must be referred to.

2. Where the same specific thing is given twice, it can take place but once.

3. Where the like quantity is given twice, the legatee is entitled to both.

4. When the second legacy is of a less amount, the legatee will take both.

¹ In Chancey's Case, while Lord Chancellor King admitted the existence of the doctrine, and declined to overturn it, he by no means approved of it.

² Story's Eq. Jurisp., § 1123; Am. note to Chancey's Case, 2 Lead. Cas. Eq. 591 (3d Am. ed.).

5. When the second legacy is of a larger amount, it is an augmentation, and the legatee will take both.¹

Perhaps a still more accurate and philosophical statement of the law is to be found in *Hurst v. Beach*,² where Sir John Leach said that, "where a testator leaves two testamentary instruments, and in both has given a legacy *simpliciter*³ to the same person, the court, considering that he who has twice given must *prima facie* be intended to mean two gifts, awards to the legatee both legacies, and it is indifferent whether the second legacy is of the same amount, or less, or larger than the first; but if in such two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both instruments the same motive is expressed, and the same sum is given, the court considers these two coincidences as raising a presumption that the testator did not by the second instrument mean a second gift, but meant only a repetition of the former gift; the court raises this presumption only where the double coincidence occurs of the same motive and the same sum in both instruments; it will not raise it, if in either instrument there be no motive, or a different motive expressed, although the sums be the same; nor will it raise it if the same motive be expressed in both instruments, and the sums be different." The rules upon the subject as thus stated have been expressly approved in a modern case by Sir James Bacon, V. C., whose judgment was subsequently affirmed by the Court of Appeals.⁴

On the other hand, where legacies of quantity in the *same* instrument are given to the same person *simpliciter*, and are of equal amount, one only will be good, nor will small differences, in the way in which the gifts are conferred, afford internal evidence that the testator intended that they should be cumulative. Thus in *Greenwood v. Greenwood* the testatrix gave "to her niece, Mary Cook, the wife of John Cook, £500," and afterwards, in the same will, amongst many other legacies, "to her cousin, Mary Cook, £500 for her own use and disposal, notwithstanding her coverture." It was held that Mary Cook was

¹ *Hooley v. Hatton*, 1 Bro. C. C. 390,

nor; 2 Lead. Cas. Eq. 346 (4th Eng. ed.).

² 5 Madd. 351-358.

³ That is with no expression of the motive of the gift.

⁴ *Wilson v. O'Leary*, L. R. 12 Eq. 525; 7 Ch. App. 448.

entitled to but one legacy of £500, and that the same was to her separate use.¹

Where, however, the legacies given by the same instrument are of unequal amount, they will be considered cumulative.²

The general principles stated above have been approved in New York by Chancellor Kent;³ and in other States of the Union in several decisions.⁴

540. As to the satisfaction of legacies by portions, or portions by legacies, the general doctrine is that there is a presumption against double portions, whenever the relation between the parties is that of parent and child, or wherever the donor stands in *loco parentis* towards the donee; but that no such presumption exists when the parties are mere strangers. The leading authority upon this subject is *Ex parte Pye*, decided by Lord Eldon in 1811, where the general presumption against double portions was recognized, and the exception in the case of strangers applied.⁵ The general rule there laid down, as well as the exception upon which the case was decided, has been since recognized both in England and in this country.⁶

It has been thought proper to notice the general doctrines of performance and satisfaction in connection with the subject of administration suits, and suits by legatees, because such questions most frequently arise in bills of this kind. The statement of these doctrines has necessarily been an exceedingly brief one; for a more elaborate examination of the authorities would be out of place in a general treatise upon the Principles of Equity, and would more properly be found in a treatise upon Wills.

¹ *Greenwood v. Greenwood*, 1 Bro. C. C. 31, n.; *Snell's Principles of Equity*, 198. rison, 127; *Creveling's Exrs. v. Jones*, 1 Zab. 573; *Minor v. Ferris*, 22 Conn. 371.

² *Curry v. Pile*, 2 Bro. C. C. 225; *Snell's Prin. of Eq.* 198.

³ Then Chief Justice; see *Dewitt v. Yates*, 10 Johns. 156.

⁴ *Jones v. Creveling's Exrs.*, 4 Har-

⁵ *Ex parte Pye*, 18 Ves. 140; 2 Lead. Cas. Eq. 365 (4th Eng. ed.).

⁶ See notes to *Ex parte Pye*, 2 Lead. Cas. Eq. 593 (3d Am. ed.).

CHAPTER VII.

INFANTS, IDIOTS, AND LUNATICS.

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| 541. Protection afforded to the persons and estates of infants at common law, and by statute.
542. Necessity for, and origin of the jurisdiction of the chancellor.
543. Infant is made a ward of court.
544. To be made a ward of court the infant must have property.
545. Proceedings may be by petition as well as by bill.
546. Appointment and removal of guardians; custody of infants.
547. Guardianship a father's <i>duty</i> , not a <i>privilege</i> . | 548. Education of the ward.
549. Management of his estate.
550. Marriage of the ward.
551. Nature and origin of the jurisdiction of the chancellor over lunatics and idiots.
552. Statutes of Edward II.
553. Subject generally regulated by statute in the United States.
554. Method of procedure in lunacy.
555. Appointment and powers of committee. |
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541. It is essential to every well ordered social system that there should exist some judicial authority by which protection may be afforded to those who cannot protect themselves; in other words, that there should be some tribunal whose duty it is to supervise the care of the persons and estates of infants, idiots, and lunatics.

In the case of infancy, this result was partially attained at common law by the guardianships of different kinds which existed under that system of jurisprudence, and to which the care of the infant's person and the management of his estate were intrusted; while in case of a breach of the guardian's duty, either by wasting the estate of the ward, or by cruelty to his person, redress was afforded by proceedings in the criminal courts, or by an action of account at law, according to the nature of the case. The writ of *habeas corpus*, moreover, was available for the purpose of rescuing the ward from illegal custody, and restoring him to his proper guardian.

Additional protection to the persons and estates of infants was also afforded in England by the provisions of the statute of

Charles II., by which the father of an unmarried infant was enabled to appoint a guardian by deed or will, whose appointment will be good against all persons claiming as guardians in socage or otherwise.¹ Similar statutes exist in nearly all, or perhaps *all*, of the United States; and, moreover, in most of the States of the Union the custody of the person of the minor and the management of his estate, and all matters appertaining to the appointment, removal, or discharge of guardians, and the settlement of their accounts, is entrusted by statute to Orphans' Courts, Surrogate's Courts, Courts of Probate, or other similar tribunals which have been constituted for the protection and administration of the estates of decedents.

542. Notwithstanding these common law and statutory provisions, there still existed in England a necessity for the interference of some other tribunal; for many cases necessarily arose in which a sufficient control over the guardian or a proper care of the ward's estate, could not be secured in the common law courts; nor could those courts possibly exercise a continuous supervision over the maintenance and education of the minor, and over the conduct of the guardian. Hence, for these purposes, there has been considered to exist in England, a prerogative in the Crown, as *parens patriæ*, to be exercised by the court of chancery, for the protection of any infant residing temporarily or permanently within its jurisdiction. And in the United States, also, although owing to the existence of special tribunals the occasions for the exercise of this head of chancery jurisdiction, are not nearly so frequent as in England, cases still arise in which equitable interposition is necessary;² and not only has it been held that the power to protect the persons and estates of minors is embraced in every general legislative or constitutional grant of chancery powers,³ but it has also been decided that wherever a court of

¹ 12 Car. II., c. 24, § 8.

² *Aymar v. Roff*, 3 Johns. Ch. 49; *Cowls v. Cowls*, 3 Gilman, 435; Am. note to *Eyre v. Countess of Shaftesbury*, 3 Lead. Cas. Eq. 270 (3d Am. ed.).

³ *McCord v. Ochiltree*, 8 Blackf. 15; *Maguire v. Maguire*, 7 Dana, 181. "The court of chancery," said Mr. Justice Nelson, in *Williamson v. Berry*, 8 How. 555,

"possesses an inherent jurisdiction which extends to the care of the persons of infants so far as is necessary for their protection and education, and also to the care of their property, real and personal, for its due management and preservation, and proper application for their maintenance."

chancery of general jurisdiction exists, testamentary and statutory guardians are as much under its superintendence and control as guardians in socage at common law.¹

While, therefore, it would be out of place to enter into an elaborate discussion upon the relation of guardian and ward, and upon the rights and duties to which that relation gives rise, it will, nevertheless, be proper to state briefly the nature of the jurisdiction of chancery upon this subject, and the manner in which the court acts in thus attempting to remedy the deficiencies of the common law.

543. The general theory upon which chancery assumes jurisdiction over the persons and estates of minors is, that, by proper proceedings, the infant has been constituted a ward of court.² Almost every court has the authority to protect the interests of an infant party by appointing a guardian *ad litem*, whose duties will relate only to the particular subject in controversy; but the action of the court of chancery in constituting a minor a ward of court, has a wider scope, and extends to the general care and protection of his person and estate.

544. Two points require perhaps to be noticed in the first instance. These are (first) that the court must, it is said, when it constitutes a minor a ward of court, have some property of the infant; and (secondly) that the application to the court may be by petition as well as by bill.³ The first of these rules was thus stated by Lord Eldon: "It is not from any want of jurisdiction that it (the court) does not act (where it has no property of an infant) but from a want of the means to exercise its jurisdiction; because the court cannot take upon itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically only where it has the means of doing so; that is to say by its having the means of applying property for the use and maintenance of the infant."⁴ In practice, however, the operation of this rule would seem to be easily evaded. Thus it often occurs that a bill is filed for the sole purpose of making an infant a ward of chancery; and in such a case the bill

¹ *Matter of Andrews*, 1 Johns. Ch. 99; *Shaftesbury*, 2 Lead. Cas. Eq. 645 (4th Eng. ed.).
Ex parte Crumb, 2 *Id.* 439.

² See *Williamson v. Berry*, 8 How. 531.

⁴ *Wellesley v. The Duke of Beaufort*, 2

³ See notes to *Eyre v. Countess of Russ*, 21; S. C., 2 Bligh (N. S.), 128.

always states that the infant has property whether the fact be so or not, and that the bill is brought against the person in whose supposed power or custody the property is.¹ And an infant may be constituted a ward of court although all the property and the actual domicil of the infant is in a foreign jurisdiction, and the infant is only temporarily within the jurisdiction of the court.²

In *Cowls v. Cowls*³ the jurisdiction of the court was made available in spite of the want of property, through the medium of an order requiring the father to pay a small sum annually for the maintenance of the infants; while the language of some of the decisions would seem to place the authority of the court, in part at least, upon the simple theory of protecting the infant from cruel treatment or from an abuse of parental authority.⁴ The necessity, therefore, for the existence of property as a prerequisite to the exercise of the jurisdiction of the court, would seem to be more of a legal fiction than a reality.⁵

545. In the second place, as to the manner in which a minor may be constituted a ward of court, it is not necessary that there should be any suit actually instituted or bill filed; the object may be attained by petition; and even an order in Chambers for the maintenance of an infant, out of the income of a legacy, upon a summons taken out in her name by her guardian, has been held, without suit, to constitute the infant a ward of chancery.⁶

546. The jurisdiction of the court of chancery may be exercised either for the purpose of appointing a guardian where the infant has none, or for the purpose of settling conflicting claims to the guardianship, or for the purpose of removing the custody of the infant's person and the care of his property from the legal

¹ *Johnstone v. Beattie*, 10 Cl. & Fin. 42; *Story's Eq. Jurisp.*, § 1351.

² *Id.*

³ 3 *Gilman*, 435.

⁴ *Maguire v. Maguire*, 7 Dana, 181; *Am. note to Eyre v. Countess of Shaftesbury*, 3 Lead. Cas. Eq. 272 (3d Am. ed.).

⁵ *In re Graham*, L. R. 10 Eq. 530. See, also, 2 Lead. Cas. Eq. 681, 682 (4th Eng. ed.).

⁶ The authority of the court of chancery in England to make orders touching

the custody of infants under seven years of age is much enlarged by Stat. 2 & 3 Vic., c. 54, § 1. See *Warde v. Warde*, 2 Phillips, 786; note to *Eyre v. Countess of Shaftesbury*, 2 Lead. Cas. Eq. 690 (4th Eng. ed.).

⁶ *In re Graham*, L. R. 10 Eq. 530. See, also, 2 Lead. Cas. Eq. 681, 682 (4th Eng. ed.).

guardian, whether the guardian be by nature (as the father, for example) or by virtue of some statute.

The jurisdiction of the court of chancery to appoint a guardian, and, if necessary for that purpose, to interfere between a father and his children, is undoubted; and has been settled by the highest authority in England, and by many cases in this country.¹ Thus, where the habits and mode of life of the father, or his treatment of his child, are such as to affect injuriously the child's health or morals, or to endanger his property, the custody of the child will be committed to a person to act as guardian;² but mere insolvency of a father will not be a ground for taking his children from him;³ and the court has refused to deprive a father, though living in adultery, of the custody of his child, where he did not bring the child in contact with the woman with whom he was so living.⁴

As in the case of a father, so *a fortiori* in the case of a testamentary guardian, will the court interfere in cases of improper conduct or character.⁵ But it seems, that, both in the case of a father and of a testamentary guardian, the court will not appoint another guardian, but will simply appoint a person to *act as guardian*.⁶

547. The guardianship of his children is not a privilege of the father, but it is a *duty* cast upon him by considerations of public welfare. He cannot, therefore, by any contract relieve himself from the responsibility of discharging this duty; and hence it must now be considered as settled (at all events in

¹ Wellesley v. The Duke of Beaufort, 2 Paige, 47; 25 Wend. 64. See 2 Lead. Russ. 1; 2 Bligh (N. S.), 124; Wood v. Cas. Eq. 685, 692 (4th Eng. ed.); and 3 Wood, 5 Paige, 596; In the Matter of Lead. Cas. Eq. 274 (8d Am. ed.).
Wollstonecraft, 4 Johns. Ch. 80; Miner v. ³ Kilpatrick v. Kilpatrick, Macphers. 143; *In re Fynn*, 2 De G. & Sm. 457; 2 Miner, 11 Ill. 43; Maguire v. Maguire, Lead Cas. Eq. 686 (4th Eng. ed.).
7 Dana, 181; Story's Eq. Jurisp., § 1341.

² Creuze v. Hunter, 2 Cox, 242; Shelley v. Westbrook, Jac. 266, n.; Anon., 2 Sim. N. S. 54; De Manneville v. De Manneville, 10 Ves. 62; Warde v. Warde, 2 Phillips, 786; Thomas v. Roberts, 3 De G. & Sm. 758; Whitfield v. Hales, 12 Ves. 492; In the Matter of Waldron, 13 Johns. 418; The People v. Mercein, 8 ⁴ Ball v. Ball, 2 Sim. 35. See, also, Commonwealth v. Addicks, 5 Binn. 520; and 2 Serg. & Rawle, 174; State v. Baird, 6 C. E. Green, 384.
⁵ Duke of Beaufort v. Berty, 1 P. Wms. 704; Smith v. Bate, 2 Dick. 631; 2 Lead. Cas. Eq. 692.
⁶ *Ex parte Mountfort*, 15 Ves. 446; 2 Lead. Cas. Eq. 685, 692, 693.

England) that contracts by a father to give up to his wife the custody and education of their children, are contrary to public policy, and will not be enforced in equity against the husband; and this, although the husband may have been guilty of adultery and cruelty to his wife.¹ There may, however, be such cases of gross misconduct on the part of the father, as will unfit him for the custody of his children.

548. Supposing, now, that the court has assumed the care of the person and property of the infant, the next question for consideration is in what particulars will the jurisdiction of the court be exercised. These are usually said to be three, viz., first, the education of the infant; second, the management of the estate; and third, the marriage of the ward.

The guardian will be allowed to regulate the mode and select the place for his ward's education, and the obedience of the ward will be enforced by the court;² and where guardians differ as to the mode of education the court will decide.

In regard to matters of religious belief the court will usually respect the creed and opinions of the father, and even in England, the court will not control a guardian in bringing up a child in a faith different from that of the established church, if it be the religion of the father.³ The subject is, however, in the discretion of the court, and the general rule may be modified by peculiar circumstances.⁴

In general the court will not allow its wards to be taken out of its jurisdiction; but this rule is subject to exceptions when the health of the ward or other peculiar circumstances render it necessary.⁵

549. As to the management of the estate of the ward, it is of

¹ 2 Lead. Cas. Eq. 671 (4th Eng. ed.).

² In *Tremain's Case*, 1 Strange, 168, the minor went to Oxford contrary to the orders of his guardian, who would have him go to Cambridge, and the court sent a messenger to carry him from Oxford to Cambridge; and upon the minor's returning to Oxford, "there went another messenger, *tam* to carry him to Cambridge, *quam* to keep there." See, also, 2 Lead. Cas. Eq. 694, notes (4th Eng. ed.).

³ *Talbot v. The Earl of Shrewsbury*, 4 My. & Cr. 672; *Hawksworth v. Hawksworth*, L. R. 6 Ch. App. 539; *Austin v. Austin*, 34 Beav. 257.

⁴ See *Stourton v. Stourton*, 8 De G. M. & G. 760. This case has not been viewed with approbation. *Hawksworth v. Hawksworth*, L. R. 6 Ch. App. 543, 544.

⁵ 2 Lead. Cas. Eq. 698 (4th Eng. ed.).

course directed for the end designed by the testator or settlor (if any) from whom the property may have been derived; and the duties of the guardian as to the care and investment of the estate are regulated very much by the general rules applicable to other trustees. Questions upon this subject generally have respect to the proper maintenance of the ward, and the sums which are to be appropriated for that purpose. Regard must be had to the condition and prospects of the ward, and to his rank in life; and while usually the income only (or a portion thereof) will be applied to his education and maintenance, the rule is not an invariable one, and in some instances the capital has been allowed to be broken in upon.¹

The power of the court of chancery over the property of its ward extends only to the personal property, and the income of the real estate; the court having no inherent power to direct a sale of the real estate for the purposes of maintenance or education. That is a power which rests exclusively with the legislature.² In most of the United States, however, the courts which have control of the estates of minors are vested with authority to order a sale of real estate when it is necessary and proper, and for the benefit of the infant.

The court may order personal property of the infant, where it is for his benefit, to be invested in land; but the order authorizing such investment will be coupled with a declaration that the land shall be considered, during the minority, as constructively personal.³

550. The last point upon which the court exercises its jurisdiction over wards of court is for the purpose of controlling their marriage. In the case of wards of the court, whether male or female, even when they have parents living, or guardians, it is necessary to apply to the court by petition for leave for them to marry, which will only be granted upon its appearing that the marriage is suitable, and the settlement proposed

¹ See notes to *Eyre v. Countess of Vaughan*, 50 Mis. 284; *Faulkner v. Shaftesbury*, 2 Lead. Cas. Eq. 718, 720, *Davis*, 18 Grat. 651. See, however, *Bulow v. Witte*, 3 S. Carolina (N. S.), 308;

² *Williamson v. Berry*, 8 Howard, 495, *Matter of Salisbury*, 3 Johns. Ch. 347; 581; 3 Lead. Cas. Eq. 269 (8d Am. ed.). *Huger v. Huger*, 3 Desaus. 18.

See, also, *Rogers v. Dill*, 6 Hill, 415; ³ *Ashburton v. Ashburton*, 6 Ves. 6; *Rivers v. Durr*, 46 Alab. 418; *Kearney v. Ex parte Phillips*, 19 Ves. 123.

is proper, and the court will prevent, as far as it can, a clandestine marriage, by ordering that the ward shall not be married without the leave of the court, and that the person desirous of marrying the ward shall not have access by letter or otherwise. A person marrying a ward of court, or contriving or assisting such a marriage, without the leave of the court, will be guilty of a contempt of court, and will be punished accordingly; and it seems that ignorance of the fact that the infant is a ward of court, although it may be urged in mitigation, will not acquit the party of the contempt.¹

551. Having considered the jurisdiction of the chancellor over the persons and estates of infants, the next subject which most naturally demands attention is that of the analogous equitable relief which is afforded in the case of persons *non compotes mentis*. It has been stated in a former part of this treatise,² that the jurisdiction of the English court of chancery, in the case of lunatics and idiots, was peculiar in this respect—viz., that it was not exercised in a regular suit, but by the chancellor personally, on petition, and that the appeal from his order is to the king in council and not to the House of Lords. This resulted from the fact that the authority of the chancellor did not exist by virtue of his office, and as a part of his general extraordinary jurisdiction, but was derived, by special authority, from the sovereign in whom, as *parens patriæ*, the care of idiots and lunatics was vested. This authority of the king not only existed at common law, but was also increased or affected by several statutes of an early date, which vested in him the profits of the land of an idiot, during the idiot's life, as a beneficial interest, and imposed upon him the duty of keeping the lands and tenements of lunatics without waste.³ In the case of a lunatic, therefore, the king was a mere trustee.

552. Before the statute *de prerogativa regis*,⁴ the custody of the persons and lands of such idiots as were possessed of lands, was in the lord of the fee, and in case the idiot had no land, he fell under the care of the king, as the general *custos* of all those who had no other guardian. By the statute just mentioned, the custody of the persons and lands of idiots was taken from

¹ See 2 Lead. Cas. Eq. 703.

² Introduction, *ante*, p. 43.

³ Stats. 17 Ed. II., c. 9; *Id.* c. 10.

⁴ Stat. 17 Ed. II., c. 9.

the lord, and entrusted to the king, to whom (as already stated), a beneficial interest in the idiot's land was given. On the other hand, the statute 17 Ed. II., c. 10, as to lunatics, was a restraining statute, as it prescribed the duties of the king, and constituted him a trustee.

Before and since these statutes, the king has exercised his control over the persons and estates of idiots and lunatics by delegating his authority, by sign-manual, to some great officer, usually (though not necessarily) the holder of the great seal.¹ The effect of the delegation of authority, under the sign manual, was merely to give the chancellor power to grant the custody of the lunatic; but after the court of chancery became well established, successive holders of the great seal imported into the exercise of their special jurisdiction under the sign manual, all the powers which they wielded as chiefs of the court of chancery. Hence, after the custody is granted, the great seal acts in matters relative to the lunatic, not under the sign manual, but by virtue of its general power as keeper of the king's conscience.²

553. In a few of the United States the care of the persons and estates of idiots and lunatics is entrusted to courts of chancery;³ but even where this is the case the jurisdiction is ordinarily exercised under statutory provisions, by which the court is pointed out and the method of procedure prescribed. In most of the States of the Union, however, the care of persons *non compotes mentis* is confided to special tribunals, and is not made a part of equitable jurisdiction. In many cases, however, the mode of procedure has been borrowed from that which grew up under the English chancellors; and it may, therefore, be useful to give a very brief outline of that procedure.

554. The jurisdiction of the chancellor was exercised, in the first place, for the purpose of ascertaining the fact of lunacy; and, secondly, for the care of the lunatic and the management of his estate. The first purpose is attained by issuing a commission under the great seal in the nature of a writ *de lunatico*

¹ See *Wigg v. Tyler*, 2 Dickens, 553.

² *Ex parte Grimstone*, Ambler, 707. Lord Campbell thought that the jurisdiction might be exercised by the chancellor by virtue of his general powers, and before

any grant under the sign manual, and so exercised it in Ireland. See 1 Campbell's Lives of the Chancellors, 14.

³ Such is the case in Tennessee and Pennsylvania, *ante*, pp. 19 and 21, notes.

inquirendo ; under which a jury is impanelled and sworn, the alleged lunatic and witnesses are examined, and a return thereof made into chancery. If the return untruly finds the party a lunatic, it may be traversed by himself or by any one claiming under a contract with him ; if it untruly finds him of sound mind, a writ of *melius inquirendum* may be issued by the crown. If the lunatic subsequently recovers, the commission may be superseded ; but for this purpose the lunatic must, in general, be personally examined and his sanity fully established.

555. If the party is found a lunatic by the return of the commission, or upon a trial under the subsequent traverse, the next duty of the court is to take care of his person and estate, and this is done by the appointment of a committee. A committee may also be appointed pending the proceedings, when such a course shall be deemed necessary by the chancellor.

The powers of a committee are exceedingly limited. He is a mere custodian of the property ; and even the powers conferred upon him by statute are to be exercised under the constant supervision and sanction of the court. A due allowance is made by the court for the lunatic's maintenance ; and the general principle upon which the estate is managed is that the interest of the lunatic alone is to be looked to, without regard to that of his eventual successors.

The powers and duties of the committee of a lunatic, and the manner in which the estate is to be managed, or converted, or applied to the maintenance of the lunatic or his family, are, of course, regulated in most of the States by statutes, into the details of which it would be impossible to enter.

Upon the death of the lunatic the powers of the committee cease ; and his duty is simply to account and hand over the property to the heir or personal representative of the lunatic, as the case may be.

CHAPTER VIII.

DISCOVERY.

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| 556. Defects in common law as to discovery; statutory changes.
557. Origin and nature of bills of discovery.
558. Subject not of as much importance as formerly.
559. Discovery must be in aid of legal proceedings.
560. General rights of complainant in bills of discovery.
561. Rules for protection of defendant; | need not discover his own title, or evidence thereof.
562. Need not criminate himself.
563. Confidential communications as to litigation.
564. State secrets.
565. In bills of discovery courts will go on and afford relief.
566. Production of documents.
567. Commissions to examine witnesses abroad; to take testimony <i>de bene esse</i> . |
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556. In a common law action the plaintiff was obliged to make out his case by calling third parties as witnesses, by compelling the production of such documents material to the issue as were in the custody or under the control of third parties, and by producing, himself, such documents as were in his own possession, and whose execution could be properly proved. No means, however, existed by which the opposite party could be compelled to testify as to the matters in dispute, or by which the production of documents in his possession could be enforced. In modern times this rule has in England and in nearly all of the United States been altered by statute, and a party to a common law action can now put his adversary upon the witness stand, without being concluded by his testimony, and without being subject to the rule which forbids leading questions, in other words, he can call and *cross-examine* the opposite party; and he can compel the production of books and papers at a reasonable period before the trial of the cause.

557. While the common law rule prevailed, and while the inconvenience consequent thereon existed, a different rule grew up in courts of equity. It was part of the machinery of the

court of chancery that a *discovery* could be compelled; in other words, the defendant in a bill in equity was obliged to answer under oath the allegations in the bill. The production of documents could also be enforced, and an opportunity for their inspection afforded. The right to discovery was in fact one of the peculiar advantages of a complainant in equity, and was always enjoyed by him in every case in which he was entitled to come into chancery, either for the purpose of asserting an equitable title, or setting up an equitable right, or applying an equitable remedy.

The jurisdiction of the High Court of Chancery being based upon matters of "conscience," an appeal to the defendant's conscience was one of the earliest and most natural modes of equitable relief.

But this right went still further. Many cases existed in which the plaintiff had a legal title or a legal right, or was pursuing a legal remedy, but wherein no redress could be actually obtained, simply because the plaintiff's evidence either rested in the breast of the defendant, or consisted, in whole or in part, of documents in the defendant's possession. Hence there was a failure of justice at common law, and hence there arose the equitable remedy of bills for discovery, which was made use of simply for the purpose of assisting or supplementing the plaintiff's remedy at common law.

Bills in equity, therefore, came to be filed not only for the purpose of discovery *and* relief, but also for the purpose of *discovery alone*; and bills of the latter description were made use of as a distinct equitable remedy, entirely outside and independent of any equitable right or title to relief.

Bills of discovery, therefore, in their technical sense, are bills which are filed for the purpose of assisting one of the parties to a common law action; and which, seeking no independent relief themselves, aim solely at arming the complainant with the necessary and proper means for asserting or defending his right or title at law.¹

558. It has been already observed that the necessity for this equitable remedy has, in modern times, been very much diminished by statutory enactments, whereby the same results

¹ See *Kearny v. Jeffries*, 48 Miss. 857.

are attained in common law trials; and hence this particular equitable remedy no longer deserves to occupy so important a place as it formerly did in equitable jurisprudence. Nevertheless it is proper that it should be (at least) briefly considered, partly because it has been decided in England, and in some of the States of the Union, that the chancery method of redress has not been ousted by the amendments to the common law;¹ and partly because in equity certain rules in regard to this peculiar remedy have been laid down, which are still considered applicable in common law suits.

559. The object of discovery being that the answer of the defendant may be made use of as evidence in some judicial proceeding in which no such advantage originally existed, it necessarily follows that this equitable remedy cannot be used except for purposes connected with proceedings in legal tribunals,² and except in aid of proceedings in a court which could not, at common law, itself give discovery.³ Thus a bill of discovery cannot be maintained if the object is simply to gratify the *curiosity* of the complainant, nor will such a bill be entertained in order to aid proceedings in a court which can, by its own method of procedure, attain the same result, *e. g.*, the ecclesiastical courts in England, which, as well as the court of chancery, had the power of enforcing discovery.⁴ And a bill of discovery will not lie in aid of proceedings which are of a criminal and not of a civil nature.⁵ But the circumstance that the proceedings *might* have assumed a criminal character is no objection to the discovery, if in fact the redress sought is through the medium of a civil action.⁶

560. The general right of the complainant in a bill of discovery is that he is entitled to an answer from every competent defendant as to all facts material to the whole of his (the complainant's) case, and that this answer must be distinct, complete,

¹ Lovell *v.* Galloway, 17 Beav. 1; Senior *v.* Pritchard, 16 *Id.* 473; British Empire Shipping Co. *v.* Somes, 3 K. & J. 433; Shotwell *v.* Smith, 5 C. E. Green, 70. See, however, Hall *v.* Joiner, 1 S. Carolina (N. S.), 186.

² See Hare on Discovery, 110.

³ *Id.* 119.

⁴ Hare on Discovery, 119.

⁵ Lord Montagu *v.* Dudman, 2 Ves. Sr. 397; Cartwright *v.* Green, 8 Ves. 405; 14 *Id.* 64; Hare on Discovery, 110.

⁶ Thorpe *v.* Macauley, 5 Madd. 230; Wilmot *v.* Maccabe, 4 Sim. 263; Hare on Discovery, 116.

free from needless prolixity, and to the best of the defendant's information and belief. To dissect the general rule thus stated, and to criticize and illustrate its different branches, would belong rather to a treatise upon equitable pleading than to one which has for its subject equitable principles. It will therefore be sufficient to refer the reader to some of the works in which this rule has been particularly discussed.¹

561. The general rule just stated is subject to certain qualifications by which the complainant's right is, as it were, fenced about by prohibitions and restrictions which it has been found necessary to lay down in order to prevent the power of the court from being abused.

And, first, the defendant is bound to discover those matters only which relate to the plaintiff's title, and is not compellable to discover his own title or the means by which he expects to prove it.² The reason of this rule is that experience has shown that the possible mischiefs of surprise at a trial are more than counterbalanced by the danger of perjury which must inevitably be incurred when either party is permitted *before* a trial, to know the precise evidence against which he has to contend; and accordingly each party in a cause has thrown upon him the *onus* of supporting his own case, and meeting that of his adversary without knowing beforehand by what evidence the case of his adversary is to be established or his own opposed.³

This reasoning, however, is not to be extended too far, for the right of the plaintiff to discovery in support of *his own case* is not to be abridged, as to any particular discovery, by the consideration that the matter of such particular discovery may be evidence of the defendant's case *in common* with that of the plaintiff.⁴

Thus, if a plaintiff is entitled to the production of a deed or other document as being applicable to *his case*, his right to such

¹ See Story's Eq. Pleading, § 853 *et seq.*; Mitford's Pleading, 857, 865.

² This rule is embodied in Sir James Wigram's third proposition, which is as follows: "The right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the *plaintiff's case*, and does not extend to a discovery of the

manner in which the *defendant's case* is to be exclusively established or to evidence which relates exclusively to his case." Wigram on Discovery, 15.

³ Wigram on Discovery, 263. See Kettlewell v. Barstow, L. R. 7 Ch. App. 686.

⁴ Wigram on Discovery, 260. See Brown v. Wales, L. R. 15 Eq. 142.

discovery will not be affected by the circumstance that the same document is evidence of the defendant's case also.¹ And so, if a defendant who is bound to keep distinct accounts for another party, *improperly* mixes them with his own, so that they cannot be severed, he must produce the whole.²

562. Secondly ; a defendant need not answer matters which tend to criminate himself or expose him to a penalty or forfeiture ; whether the matter inquired of be the broad and simple fact of crime or penalty, or whether it be simply an incidental fact which may form a link in the chain of evidence if any one chooses to indict him.³

But this rule has some exceptions, for it has not been invariably applied to all cases of penalties,⁴ and it will not be available for the purpose of preventing the detection of fraud or imposition.⁵

563. Thirdly ; confidential communications, made to advisers or agents, with reference to a subject matter which afterwards comes into litigation, or with reference to questions connected with that which afterwards becomes the subject matter of litigation, are protected.

The tendency of the modern English authorities is to give a very wide scope to this rule, and to afford protection in cases in which, under the narrower doctrine which formerly existed, the communications would not have been considered privileged. Thus, in *Lawrence v. Campbell*⁶ (decided in 1859), Vice-Chancellor Kindersly laid down the rule that it is not now necessary, as it formerly was, for the purpose of obtaining protection, that the communications should be made either during or relating to an actual or even to an expected litigation, but that it is sufficient if they pass as professional communications in a professional capacity. And this rule was expressly approved in 1873

¹ *Burrell v. Nicholson*, 1 Myl. & Keene, Conn. 528 ; *Mitford's Pleading*, 195 *et seq.*

² *Freeman v. Fairlie*, 3 Meriv. 29 ; *Earl of Salisbury v. Cecil*, 1 Cox, 277 ; *Hare on Discovery*, 245 ; *Wigram on Discovery*, 243.

• ³ *Adams's Doct. Eq.* 2.

⁴ *King of Two Sicilies v. Willcox*, 1 Sim. N. S. 301 ; *Skinner v. Judson*, 8

⁵ *Dummer v. Corporation of Chippenham*, 14 Ves. 245 ; *Lee v. Read*, 5 Beav. 381 ; *Skinner v. Judson*, 8 Conn. 528 ; *Attwood v. Coe*, 4 Sandf. Ch. 412 ; *Howell v. Ashmore*, 1 Stockt. 82 ; *Reynell v. Sprye*, 10 Beav. 51 ; 11 Beav. 618.

⁶ 1 Drew, 485, 490.

by Lord Chancellor Selborne, in *Minet v. Morgan*,¹ where not only letters between the defendant and his family solicitors, and letters between himself and his solicitors in the cause, but also letters between the defendant's mother (through whom he claimed title) and her solicitors, with reference to questions connected with the matters in dispute, written before any litigation was in contemplation, were protected.²

So, also, a liberal interpretation was given to another branch of the rule, above stated, by Vice-Chancellor Stuart, in *Ross v. Gibbs*,³ and it was there held by that learned judge that confidential communications, made with an *unprofessional* agent, were privileged, if such communications were made in anticipation of and with reference to a litigation.

The courts in this country, however, do not seem to have carried the doctrine of privileged communications to the extent which it has reached in England. Thus, in *Whiting v. Barney*,⁴ the Court of Appeals in New York adhered to the old rule that a communication, in order to be protected, must be made during the pendency of a cause; while, in several cases, the applicability of the doctrine has been confined to disclosures made to *legal advisers* only, and has not been extended to persons of a non-professional character.⁵ It is submitted, however, that the modern English rule is more consonant with principles of justice and public policy; and that the true tests to apply are these: first, was the communication made with reference to that which afterwards became the subject of litigation? and secondly, was the communication confidential? If both of these requisites

¹ L. R., 8 Ch. App. 361.

² "If this question had arisen," said the Lord Chancellor, in this case, "in the days of Lord Cottenham, it would have better justified the prolonged argument than at the present time. There can be no doubt that the law of the court as to this class of cases did not at once reach a broad and reasonable footing, but reached it by successive steps, founded on that respect for principle, which usually leads the court aright." And the chancellor then went on to discuss the

cases *seriatim*, and to point out the process by which the present doctrine of the English courts had been attained. See, also, *Wilson v. Northampton and Banbury Junction Railway Co.*, L. R., 14 Eq. 477.

³ L. R., 8 Eq. 522.

⁴ 30 N. Y. 330.

⁵ See *Corps v. Washington*, 2 Wash. C. C. 388; *Andrews v. Solomon*, Pet. C. C. 356; *Goddard v. Gardiner*, 28 Conn. 172; *Coon v. Swan*, 30 Verm. 6; *Adams's* Doct. Eq. 6, notes.

exist, the sounder doctrine would seem to be that the disclosure should be protected.

It must be added that this privilege is the privilege of the client, not of the counsel. The client is entitled to the protection; and he alone can claim it.¹

564. Lastly, official persons cannot be compelled to disclose matters of state, the publication of which would be prejudicial to the interests of the community. The rule exists both at law and in equity, and in this country as well as in England. The cases, however, in which the question has arisen are very few.²

It will be remembered that a *bonâ fide* purchaser for value without notice is protected from discovery. The reasons for this rule, and its nature and extent, have been already stated.³

565. Before leaving the subject of discovery it may be desirable to notice a question as to which there has been not a little embarrassment in the minds of authors and judges; and that is, whether, when the jurisdiction of equity has once attached for the purpose of discovery, the court will go on for the purpose of affording relief, although the cause is not one which would ordinarily fall within the scope of a chancellor's jurisdiction. The true rule would seem to be that laid down by a learned writer in modern times,⁴ viz., that where the bill is filed purely in aid of a legal right and for the purpose of obtaining evidence to be used in a trial at law, the jurisdiction will not extend to afford relief; but that where the bill is based upon any breach of trust or duty, and an appeal to the defendant's conscience consequently becomes necessary, the general jurisdiction will attach.

566. At common law no power existed in the courts to compel the production of deeds, books, and writings which were in the custody or power of one of the parties to a cause, and which were material to the right, title, or defence of the other.⁵ Application was, consequently, made to the court of chancery; and

¹ See *Ross v. Gibbs*, L. R. 8 Eq. 524.

² *Ante*, p. 268.

³ See *Smith v. East India Co.*, 1 Phillips, 50; *Rajah of Coorg v. East India Co.*, 25 L. J. Ch. 365; *Marbury v. Madison*, 1 Cranch, 144; 1 Burr's Trial by Robinson, 186, 187.

⁴ Mr. Justice Redfield in his edition of Story's Equity Jurisp. 74 a, 74 c. See, also, *Pearce v. Creswick*, 2 Hare, 286.

⁵ 2 Black. Com. 382; Story's Eq. Jurisp., § 1485.

the jurisdiction of the chancellor was frequently exercised for the purpose of rectifying the defect in the common law, and of compelling such production.

This equitable remedy is, however, of scarcely any importance at the present day; as both in England and in this country statutes have been passed by which the authority to compel the production of documents is conferred upon the common law courts. The consideration of this subject may, therefore, be dismissed with the single remark that the rules which govern bills in equity for the production of documents are similar to those by which the right to discovery is regulated, and which have been already noticed.

567. The remarks just made will also apply to bills for commissions to examine witnesses abroad, and to bills to take testimony *de bene esse*. Such bills were formerly necessary in consequence of the inability of the common law courts to accomplish the object; but this defect has long since been remedied, and the equitable remedy has fallen almost completely into disuse.¹

CHAPTER IX.

BILLS QUIA TIMET; RECEIVERS; WRITS OF NE EXEAT; AND OF SUPPLICAVIT.

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| 568. Bills <i>Quia Timet</i> ; their general nature. | 576. Receivers: general nature of the jurisdiction. |
| 569. Examples. | 577. Appointment a matter of discretion; rules under which the discretion is exercised; <i>Blondheim v. Moore</i> . |
| 570. Personal property limited for life with remainders over. | 578. Cases in which a receiver will be appointed. |
| 571. Courts of equity will not entertain bills solely to <i>declare</i> rights. | 579. Effect of appointment. |
| 572. Will not interfere in certain cases of covenants. | 580. Powers and duties of a receiver. |
| 573. Bills to perpetuate testimony. | 581. Writs of <i>Ne Exeat</i> . |
| 574. Bills to establish wills. | 582. Writs of <i>Supplicavit</i> . |
| 575. Bills to remove a cloud from title. | |

568. *BILLS Quia Timet* in equity answer to the *brevia anticipantia* of common law. These writs are enumerated and explained by

¹ Story's Eq. Jurisp., § 1514, note; Adams's Doct. Eq. 23.

Coke. "And note," he says, "that there be six writs in law that may be maintained, *quia timet*, before any molestation, distress, or impleading. As (1) a man may have a writ of mesne (whereof Littleton here speaks) before he be distrained; (2) a *warrantia chartæ* before he be impleaded; (3) a *monstraverunt* before any distress or vexation; (4) an *audita querela* before any execution sued; (5) a *curia claudenda* before any default of inclosure; and (6) a *ne injuste vexes* before any distress or molestation."¹ By analogy to these writs, bills in equity are sometimes entertained to guard against possible or prospective injuries, and to preserve the means by which existing rights may be protected from future or contingent violations. The principle upon which the court acts in such cases is that justice sometimes requires that a man shall not be compelled to have hanging over him, or his title, for an indefinite time, some claim or demand or liability, which if enforced would subject him to loss; but that he is entitled to have the questions relating to his rights settled at once and forever, or to be at once made secure against any future liability. It will be seen that relief of this sort goes one step further than the relief by injunction. Injunctions restrain a person from *continuing* an infringement upon the rights of another, and (in some cases) will *prevent* the commission of a threatened injury. But a bill *quia timet* proceeds to the extent of securing rights against an invasion, which need not be imminent or certain, but which may be only future and contingent. Looking, therefore, upon three of the equitable remedies, which are noticed in the present treatise, as arranged in an ascending scale, we have, upon the lowest step, *mandatory* injunctions, correcting *past* injuries and *restoring* rights; upon the next, prohibitory injunction, preventing *present* or *imminent* injuries and *preserving* rights; and upon the last, bills *quia timet*, anticipating and guarding against *future* and *contingent* injuries, and, as it were, *insuring* rights.

It is perhaps impossible to define the exact boundaries which circumscribe the area of the equitable remedy of bills *quia timet*, as they are not unfrequently entertained upon the peculiar circumstances of each individual case, and the instances in which the jurisdiction has been exercised are to be regarded rather as

¹ Co. Litt. 100 a.

illustrations of the remedy, than as indicating the limitations of its extent.

569. A few examples, however, of bills of this kind will assist in making clear the general character and scope of this equitable remedy. *Ranelagh v. Hayes*¹ is a case which is frequently cited as an illustration of bills of this class.² In this case the plaintiff assigned several shares of the excise in Ireland to the defendant, and the latter covenanted "to save the Lord Ranelagh harmless touching three parts of a *farm*,³ assigned to Hayes," and to stand in his place touching the payments to the king and other matters. Afterwards the king sued the plaintiff for money which the defendant ought to have paid, and the former then filed his bill. The court decreed that the agreement should be specifically performed, and referred it to a master and directed that *toties quoties* any breach should happen he should report the same especially to the court, so that the court might, if there should be occasion, direct a trial at law in a *quantum damnificatus*. The court further decreed that the assignee should clear the assignor from all these suits and encumbrances within a reasonable time. The case was compared to that of a counterbond, where, although the surety is not molested or troubled for the debt, yet after the money becomes payable, the court will decree the principal to pay it. A more modern example of the same kind of relief will be found in the case of *Hemming v. Maddick*,⁴ where the plaintiff, who had been made a contributory in respect of certain shares of a joint stock company which was being wound up under the English Companies Act of 1862, filed a bill in which he alleged that he had taken the shares under an arrangement with the defendant that he should hold them on behalf of the defendant, and deal with them as the defendant should direct, and that the defendant should indemnify him against all loss or liability which he might incur as the holder of the shares. The prayer of the bill was that the defendant might be ordered to reimburse to the plaintiff all sums of money which he had paid for calls and all costs *et cetera*, and to indemnify him against all liability in consequence of his being made a contri-

¹ 1 Vern. 189.

² The Irish excise was *farmed out* by

³ See Story's Eq. Jurisp., § 850; Charles II.

Rawle on Covenants for Title, 652.

⁴ L. R. 7 Ch. App. 395.

butory. The trust having been satisfactorily established by the evidence, the plaintiff's right to the indemnity was treated as a matter of course, and a decree was made accordingly.

570. Bills *quia timet* are also frequently entertained in cases where personal property is limited for life, with remainders over, and when there is danger of loss or deterioration or injury to it in the hands of the tenant for life. In such cases a court of equity will interfere at the instance of a remainderman, and if necessary will require security to be given for the production of the property upon the termination of the life interest.¹

571. But while a court of equity will interfere for the purpose of protecting the interests of remainder-men, when the property is in danger, it will not interpose merely in order to declare future rights. The Scotch tribunals pass upon such questions by "*declarator*"; but such a power has not been assumed by courts of equity, either in England or in this country.² It is true that it is a very common exercise of chancery powers to declare the effect and validity of future and contingent limitations in wills, even as to persons not in *esse*, upon bills filed by executors and trustees, asking for the direction of the court as to the disposition of the property. But bills of this kind are entertained upon the ground that a trustee is always entitled to come into chancery for advice and assistance in the administration of the trust;³ and do not, therefore, in any way, militate against the doctrine, just stated, as to mere declarations of future rights.⁴

572. Another illustration of the limitations which courts of equity have deemed proper to place upon relief of a *quia timet* character, is found in those cases in which a purchaser of land takes it subject to an encumbrance of which he is aware, and

¹ See *Flight v. Cook*, 2 Ves. 619; *James v. Scott*, 9 Alab. 579; *Emmons v. Cairns*, 2 Sandf. Ch. 369; *McDougal v. Armstrong*, 6 Humph. 428, 157; *Bowling v. Bowling*, 6 B. Mon. 31; *Cranston v. Plumb*, 54 Barb. 59; *Van Duyne v. Vreeland*, 1 Beas. 142; *McNeill v. Bradley*, 6 Jones (Eq.), 41.

² See *Grove v. Bastard*, 2 Phillips, 621; *Langdale v. Briggs*, 39 Eng. Law and Eq. 214; 8 De G. M. & G. 391; *Cross v. DeValle*, 1 Wallace, 14.

³ *Ante*, p. 151; Hill on Trustees, 543.

⁴ See the remarks of Mr. Justice Grier, in *Cross v. De Valle*, 1 Wallace, 15 and 16.

takes also a covenant from the vendor against the encumbrance. In such cases it has been held that the purchaser cannot, under such circumstances, file a bill *quia timet*, and obtain an indemnity from the vendor; the ground of these decisions being, that, as the purchaser has chosen to rest upon the covenant, a court of equity will not make a new contract for the parties.¹

573. Bills to Perpetuate Testimony, and Bills to Establish Wills, are also in the nature of bills *quia timet*. The perpetuation of testimony is necessary when the complainant is not actually threatened with any disturbance of his rights, but fears that he may be disturbed at some future time when the evidence of his title may have been lost. Upon a bill being filed, in such a case, the depositions of witnesses are taken before an examiner, and a decree is then made that the depositions so taken shall remain to perpetuate the memory thereof. Bills of this description have been of very frequent occurrence in Pennsylvania, for the purpose of preserving the evidence of a re-entry upon land conveyed upon ground rent, for non-payment of arrears.

In order to maintain a bill for the perpetuation of testimony, it is necessary that the matter should be one which cannot be made the subject of present judicial investigation. If a party is in a situation actively to assert his right, either at law or in equity, he cannot maintain a bill to perpetuate the testimony, for he can obtain the same redress by proceeding at once to a substantial assertion of his title by suit at law or bill in equity. And even if a party is *not* in a condition to make himself a plaintiff, yet if an action is brought against him, touching the subject matter, he cannot file a bill for the perpetuation of testimony, and a demurrer to such a bill will be sustained on the ground that the complainant's rights can be ascertained and settled in the suit already pending.²

574. Bills to Establish Wills proceed upon a similar principle. According to the modern authorities such a bill may be filed by

¹ See *Redfield v. Woodfolk*, 22 How. 318; subject of bills to perpetuate testimony, *Rawle on Covenants for Title*, 683, 684 *Dursley v. Fitzhardinge*, 6 Ves. 251; (4th ed.); *Story's Eq. Jurisp.*, § 850, a *Dorset (Duke of) v. Girdler*, Prec. Ch. (11th ed.). 531; *Angell v. Angell*, 1 Sim. & Stu. 83;

² See *Earl Spencer v. Peek*, L. R., 3 *Beavan v. Carpenter*, 11 Sim. 22; *Wright Eq.* 415, where this point is thoroughly *v. Tatham*, 2 Sim. 459; *Story's Eq. Plead.* discussed. See, also, upon the general § 300 *et seq.*

a devisee in possession against an heir who has brought no action of ejectment, although no trusts are declared by the will, and although it is not necessary to administer the estate under the direction of the court of chancery.¹ And the same relief will also be afforded not only against an heir, but also against parties claiming under another will.²

575. Bills to remove a cloud from a title may sometimes also fall under the head of relief *quia timet*, although, as has been seen, they may occasionally be properly classed under bills for the surrender and cancellation of void instruments.³ The principle upon which these bills are based, is simply that it is inequitable that a party in possession should be embarrassed by having hanging over him a hostile claim, which, although not actively asserted, and not of any validity, is nevertheless calculated to affect the marketability of the title. The jurisdiction of courts of chancery in such cases is well established.⁴

576. Another of those equitable remedies which have for their object the *prevention*, rather than the *redress* of injuries, is found in the relief given by courts of chancery by means of the appointment of receivers. The appointment of receivers has, indeed, in many treatises been classed under the head of the *quia timet* jurisdiction of chancery, and in a certain sense this classification is correct; but, perhaps, it would be still more accurate to say that the relief afforded by the appointment of receivers is one of several phases which the *preventive* jurisdiction of the court of chancery assumes, and that it is analogous to, rather than indetical with, the relief which is granted in bills which are technically *quia timet*.

The general subject of receivers is one which has assumed not

¹ *Boyse v. Rossborough*, Kay, 71; affirmed in 3 De G. M. & G. 817; and, on appeal to the House of Lords, *nomine Colclough v. Boyse*, 6 H. L. Cas. 1.

² *Lovett v. Lovett*, 3 K. & J. 1. *In re Tayleur*, L. R., 6 Ch. App. 416, was a somewhat curious application. The committee of a wealthy lunatic, who had made two wills before he was found a lunatic, asked for leave to pay out of the estate the costs of the plaintiffs and de-

fendants in a suit to perpetuate testimony as to the two wills. The court declined to express any opinion upon the question whether or not such a bill would lie, but granted the prayer of the committee.

³ See *ante*, p. 427.

⁴ *Doe v. Doe*, 37 N. Hamp. 268; *Kimberley v. Fox*, 27 Conn. 807; *Manson v. Muson*, 28 *Id.* 582; *Eldridge v. Smith*, 34 Verm. 484; *Story's Eq. Jurisp.*, § 700.

a little importance during the past few years; and the necessity for such a preventive remedy has not only led to the frequent interposition of courts of chancery, but has also induced legislation in very many States of the Union, by which the same object is attained through the medium of statutory forms. Even, however, in those States where such statutes exist, the principles of the court of chancery in relation to receivers are looked to for guidance; and hence it will be proper to give an outline (which must necessarily be a brief one) of these principles, and a few illustrations of the manner in which they are applied.

A receiver is an indifferent person between the parties appointed by the court to collect and receive the rents, issues, and profits of land, or the produce of personal estate, or other things which it does not seem reasonable to the court that either party should do; or where a party is incompetent to do so, as in the case of an infant.¹ The remedy of the appointment of a receiver is one of the very oldest in the court of chancery;² it has been assumed for the advancement of justice, and is founded on the inadequacy of the remedy to be obtained in the courts of ordinary jurisdiction.³

577. As a general rule the appointment of a receiver is a matter which rests in the discretion of the court;⁴ but this discretion is sometimes the subject of error;⁵ and is always exercised under certain well-established rules. These rules were stated in *Blondheim v. Moore* (a leading authority in this country), to be (1) that the power of appointment is a delicate one, and is to be exercised with great circumspection; (2) that it must appear that the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the pro-

¹ Dan. Ch. Prac. 1552; Kerr on Receivers, 2 (1st Am. ed.). See, also, *Booth v. Clark*, 17 Howard, 331; *Lottimer v. Lord*, 4 E. D. Smith, 183; *Libby v. Rosekrans*, 55 Barb. 202; *Baker v. Backus*, 32 Ill. 79; *Beverley v. Brooke*, 4 Grat. 208.

² Per Vice-Chancellor Sir G. M. Giffard, in *Hopkins v. Canal Proprietors*, L. R. 6 Eq. 447. See, also, 1 Spence Eq. 673, note f; and *Id.* 378.

³ Kerr on Receivers, 1.

⁴ *Owen v. Homan*, 4 H. L. Cas. 1032; Kerr on Receivers, 3 (1st Am. ed.), and notes.

⁵ See *Milwaukee Railroad Co. v. Soutter*, 2 Wallace, 521, where an order of the Circuit Court refusing to discharge a receiver was, under the circumstances, held to be error, and was reversed in the Supreme Court.

perty; (3) that the court never appoints a receiver merely because the measure can do no harm; (4) that fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved; and (5) that unless the necessity be of the most stringent character, the court will not appoint a receiver until the defendant is first heard in response to the application.¹

The conduct of the party who applies for a receiver is also the subject of scrutiny, and unless that conduct is free from blame a receiver will be refused.² Moreover, parties who have acquiesced in property being enjoyed against their own alleged rights, cannot come into the court for a receiver.³

578. The cases in which a receiver may be appointed are numerous. Thus, the appointment may be made either because of the incapacity of the holder of the legal title; or because of the untrustworthiness of such holder; or because of disputes between legal owners; or because equitable rights might be endangered by leaving the property in the hands of the holder of the legal title; or because the rights of remainder-men or reversioners might be endangered.

Of the first head the case of infants is an example. The court will interfere for the protection of infants; and will protect their estate even as against the legal guardian.⁴

Of the second head, illustrations will be found in those cases in which property is taken out of the hands of executors or trustees, and placed in the custody of receivers. In such cases the court will not act upon slight grounds, but upon a proper case being made out, as where misconduct, waste, or improper disposition of trust assets can be shown, there is a case for a receiver.⁵

¹ *Blondheim v. Moore*, 11 Maryl. 364. See, also, *Voshell v. Hynson*, 26 Maryl. 83; *Tomlinson v. Ward*, 2 Conn. 391; *Orphan Asylum v. McCartee*, Hopkins, 429; *Mays v. Rose*, 1 Freem. (Ch.) 703; *Ladd v. Harvey*, 1 Foster, 514; *Maynard v. Raily*, 2 Nevada, 313; *Crawford v. Ross*, 39 Georgia, 44; *Whitworth v. Whyddon*, 2 Mac. & G. 55; *Evans v. Coventry*, 5 De G. M. & G. 917; *Cupit v. Jackson*, 13 Price, 734; *Kerr on Receivers*, 9 (1st Am. ed.).

² See *Baxter v. West*, 28 L. J. Ch. 169.

³ See *Tibbals v. Sargent*, 1 McCart. 449.

⁴ *Butler v. Freeman*, Amb. 303; *Beaufort (Duke of) v. Berty*, 1 P. Wms. 704; *Rice v. Tonnele*, 4 Sandf. (Ch.) 568; *Kerr on Receivers*, 15 (1st Am. ed.).

⁵ *Beverley v. Brooke*, 4 Grattan, 208; *Liddell's Exrs. v. Starr*, 4 C. E. Green, 163; *Anon.*, 12 Ves. 4; *Evans v. Coventry*, 5 De G. M. & G. 918; *Kerr on Receivers*, 17 *et seq.* (1st Am. ed.).

Again; receivers may be appointed because of disputes between holders of legal titles, whether the dispute is as to who is really the holder of the legal title, or as to which of two legal holders shall be entitled to the custody of the property. Thus where there is a dispute as to the right of probate or of administration, a receiver will, in a proper case, be appointed.¹ It must, however, be remembered that such appointments are only made in obedience to the general rules already stated; and that the court will not interfere unless there is proof that the legal title is in danger of being abused.²

An illustration of the necessity for the appointment of a receiver as between two holders of the legal title, occurs in the case of partners. Where there is a violation of partnership rights by which an improper or fraudulent disposition of partnership property may be effected, a receiver will be appointed; but the jurisdiction in such cases is an extremely delicate one, and should not be exercised except in such cases of misconduct as would justify a decree for a dissolution; and even where a dissolution is contemplated by the decree and there is a disagreement among the partners, it is not in all cases proper to appoint a receiver.³

Receivers will be appointed when equitable rights are in danger of being injured by a holder of the legal title. Thus a receiver may be appointed on the application of an equitable mortgagee, in a foreclosure suit or other suit for enforcing his security against the mortgagor in possession having the legal estate.⁴ And so also in carrying out equitable remedies it is sometimes necessary to appoint a receiver; as (for example) in the case of creditors' bills, or other means by which the rights of judgment creditors

¹ *King v. King*, 6 Ves. 172; *Devey v. Thornton*, 9 Hare, 229; *Hitchin v. Birks*, L. R. 10 Eq. 471; *Rutherford v. Douglass*, 1 Sm. & Stu. 111, n.; *Ball v. Oliver*, 2 V. & B. 96; *Rachel Colvin's Case*, 3 Maryl. Ch. Dec. 279.

² *Dewey v. Thornton*, 9 Hare, 229; *Hitchen v. Birks*, L. R. 10 Eq. 471; *Schlecht's Appeal*, 10 P. F. Sm. 172.

³ *Slemmer's Appeal*, 8 P. F. Sm. 168.

See upon the subject of the appointment of receivers in partnership cases, *Gowan v. Jeffries*, 2 Ashmead, 304; *Holden v. McMakin*, 1 Pars. Eq. Cas. 270; *Williamson v. Wilson*, 1 Bland, 418; *Randall v. Morrell*, 2 C. E. Green, 346; *Sloan v. Moore*, 1 Wright (Pa.), 217; *Kerr on Receivers*, 81 (1st Am. ed.).

⁴ *Reid v. Middleton*, T. & R. 255;

Kerr on Receivers, 49 (1st Am. ed.).

against property which cannot be reached at law, is sought to be enforced.¹

The holder of an estate in remainder may also apply for a receiver in consequence of the misconduct of the holder of the particular estate.²

Other cases in which receivers are appointed and which fall within the general principles already stated, are those between debtor and creditor,³ in the case of public companies;⁴ between vendor and purchaser;⁵ between covenantor and covenantee;⁶ in cases of bankruptcy;⁷ in cases of lunacy;⁸ of tenants in common;⁹ and in the case of parties in possession of real estate under a legal title.¹⁰

579. A receiver is an officer of the court, and his possession is that of the court. The effect of his appointment is to remove the parties to the suit from the possession of the property; but at the same time, the *right* to the property is in no way affected by such appointment, and the receiver merely holds the property as a custodian, and for the benefit of him who may be ultimately entitled to it. The possession of the receiver will be protected from interference by third persons; and the court will not permit this possession to be disturbed even by judicial process.¹¹

580. A receiver is as a general rule a mere custodian, and has no powers except those expressly conferred upon him by the order of his appointment, or by special directions of the court from time to time. His general duty may be said to be to take possession of the estate in the room and place of the owner thereof; and under the supervision of the court, so to manage the property as to preserve the same, and (if possible) to make it profitable for those who may ultimately be declared the owners thereof. The powers of a receiver are limited. All his actions are under the immediate control of the court; and in order to a safe custody of the estate he must constantly apply to the court for its advice and sanction.¹²

¹ See *Osborn v. Heyer*, 2 Paige, C. R. 342; Kerr on Receivers, 51, 58 (1st Am. ed.).

² Kerr on Receivers, 81 (1st Am. ed.).

³ *Id.* 51-61.

⁴ *Id.* 62-75.

⁵ *Id.* 76-79.

⁶ *Id.* 79-80.

⁷ *Id.* 102-104.

⁸ *Id.* 105-106.

⁹ *Id.* 106-111.

¹⁰ *Id.* 111-118.

¹¹ See Kerr on Receivers, chap. vi.

¹² Kerr on Receivers, chap. vii.

581. The writ of *Ne Exeat Regno* is an equitable remedy in the nature of bail at common law. It was originally a high prerogative writ, and is supposed to have been introduced originally some time between the reign of John and that of Edward I.; and it was issued only when the government deemed it expedient, as a matter of State policy, to restrain some one from departing from the kingdom. As early as the reign of Queen Elizabeth, however, the practice grew up of using the writ as a purely civil remedy, and for the purpose of enforcing equitable rights. This is the only use which is made of it in this country, where it is treated not as a prerogative writ, but as an ordinary process which issues as of right, in cases in which it is properly grantable.¹ This remedy has accordingly been made use of in many States from the early colonial periods down to the present time;² and in some States the jurisdiction to issue such writs is expressly conferred by statute.³

The remedy is of a very useful character, and sometimes of great practical importance. Thus, to take a modern case by way of illustration, in *MacDonough v. Gaynor*,⁴ the complainants and defendants were engaged in partnership in New Jersey in the construction of a railroad, and a bill was filed for an account. The defendants resided in Pennsylvania; and it was shown by affidavit that they were only temporarily in New Jersey, and intended returning to the former State in a very short time. Upon this state of facts the writ of *ne exeat* was issued, the defendants to be released upon giving bond to answer and abide the decree of the court.

From the authorities upon the subject of writs of *ne exeat* both in England and in this country, it has been considered that as a general rule the writ will be issued only in the case of equitable debts and claims, but that to this rule there are two exceptions,

¹ Story's Eq. Jurisp., § 1469.

² See Rawle's Essay on Equity in Pennsylvania, 40 *et seq.*; and the Registrar's Book of Keith's Court of Chancery, in the Appendix. See, also, *Rice v. Hale*, 5 Cush. 242; *Samuel v. Wiley*, 50 N. Hamp. 853; *Porter v. Spencer*, 2 Johns. Ch. 169; *Gibert v. Colt*, 1 Hopk. 499; *Bushnell v.*

Bushnell, 15 Barb. 399; *Breck v. Smith*, 54 *Id.* 212; *Dransfield v. Dransfield*, 6 Philada. 143; *McDonough v. Gaynor*, 3 C. E. Green, 249; *Dean v. Smith*, 23 Wisc. 483; *Dan. Ch. Prac.* (by Perkins) 1800.

³ See *ante*, Introduction.

⁴ 3 C. E. Green, 249.

viz., first, in the case of alimony decreed to a wife, which will be enforced against her husband by a writ of *ne exeat* if he is about to quit the State;¹ and secondly, in certain cases of account, which are, however, after all, of equitable cognisance, and therefore do not properly constitute an exception to the general rule.

582. The writ of *Supplicavit* was a writ in the nature of process at common law to find sureties of the peace. "It was granted," says Lord Chief Baron Gilbert, "upon complaint and oath made of the party, where any suitor of the court is abused and stands in danger of his life, or is threatened with death by another suitor."²

This writ has gone almost completely out of use, as the same end is now fully attained by proceedings at common law, by which security for breach of the peace is exacted. No case in which this writ has been granted appears to exist in the United States. Chancellor Kent, in *Codd v. Codd*,³ refused the writ, and doubted whether it ought now to be granted in chancery as the remedy in law is complete; and although it is said by Mr. Justice Story, in his *Commentaries on Equity Jurisprudence*, that "it is difficult upon the authorities to maintain the doubt,"⁴ yet the opinion of Chancellor Kent seems to have been adopted in a modern case by the Supreme Court of Massachusetts. The case referred to is *Adams v. Adams*,⁵ decided in 1868, where a married woman applied for the writ of *supplicavit* in order to obtain maintenance from her husband, by whom (it was alleged) she was cruelly treated. The application was refused, partly on the ground that a decree for alimony was only incidental to the relief afforded by a writ of *supplicavit*, and could not therefore be made the main object of the writ, and partly, also, because the complainant had a complete remedy at law.⁶

¹ *Denton v. Denton*, 1 Johns. Ch. 364.

² Gilbert's *Forum Rom.* 202, 203.

³ 2 Johns. Ch. 141.

⁴ Story's *Eq. Jurisp.*, § 1476, note.

⁵ 100 Mass. 265.

⁶ One of the grounds of the application in this case was that the complainant had conscientious scruples against instituting

proceedings in divorce; but the court said, with no little force, that it could hardly be contended that a bill in equity on an ordinary tort (for example) could be supported simply because the complainant was conscientiously opposed to bringing a common law action.

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